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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 791

SEWELL LEE AVERY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

No. 792

SEWELL L. AVERY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 16, 1934.

CERTIORARI GRANTED MARCH 19, 1934.

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1 Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.* } Docket No. 40238

Appearances:

For Taxpayer: Morris L. Johnston, Esq., Leland K. Neeves, Esq.

For Comm'r: Chester A. Gwinn, Esq.

DOCKET ENTRIES.

1928

Aug. 13—Petition received and filed. Taxpayer notified. (Fee paid.)

Aug. 14—Copy of petition served on General Counsel.

Oct. 6—Answer filed by General Counsel.

Oct. 10—Copy of answer served on taxpayer. General Calendar.

1931

Sep. 23—Hearing set Nov. 10, 1931.

Sep. 28—Motion to place on the Chicago Circuit Calendar filed by txpayer. 10/27/31 granted.

1932

Jul. 12—Hearing set in Chicago, Illinois, beginning Sept. 6, 1932.

Sep. 19—Hearing had before Mr. Trammell on merits. Submitted. Stipulation of facts filed. Petitioner's brief due in 2 weeks—2 weeks for reply—respondent's brief due 2 weeks after petitioners! Calendar call September 6, 1932.

Oct. 3—Brief filed by taxpayer.

Oct. 11—Transcript of hearing of September 19, 1932, filed.

Oct. 31—Motion for extension to Nov. 14, 1932, to file brief and to Nov. 30, 1932, to file reply brief, filed by General Counsel. 11/1/32 granted.

Nov. 14—Brief filed by General Counsel.

Nov. 29—Reply brief filed by taxpayer.

1933

Feb. 2—Memorandum opinion rendered, Charles M. Trammell, Div. 2. Judgment will be entered for the respondent.

Feb. 2—Decision entered, Charles M. Trammell, Div. 2.

Feb. 27—Motion for review by entire Board, filed by taxpayer.

Feb. 27—Order denying motion for review entered.

Mar. 6—Motion to fix amount of bond filed by taxpayer.

Mar. 8—Order fixing amount of bond in the amount of $162,000 entered.

Apr. 18—Supersedeas bond in the amount of $162,000 approved and ordered filed.

Apr. 25—Petition for review to U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Apr. 26—Proof of service filed.

May 26—Statement of evidence lodged by taxpayer.

May 29—Notice of lodgement of statement and of hearing June 7, 1933, to approve statement filed.

Jun. 1—Notice of agreement with statement of evidence filed by General Counsel.

2 Jun. 2—Motion to settle statement of evidence filed by taxpayer.

Jun. 2—Praecipe with proof of service thereon filed.

Jun. 3—Statement of evidence approved and ordered filed.

Jun. 19—Order enlarging time to 7/31/33 for transmission and delivery of record entered.

UNITED STATES BOARD OF TAX APPEALS.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue, *Respondent.*
} Docket No. 40238.

PETITION.

Filed Aug. 13, 1928.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency, Bureau symbols IT:AR:B-1, FMAL-60D, dated Washington, June 28, 1928, and as a basis of his proceedings, alleges as follows:

1. Petitioner is an individual, with office at 300 West Adams street, Chicago, Illinois.

2. The Notice of Deficiency, a copy of which is attached

and marked Exhibit A, purports to have been mailed to petitioner on June 28, 1928.

3. The taxes in controversy are, individual income taxes of the petitioner for the calendar years 1924, 1925 and 1926; and for the amount of the deficiency, $101,269.27, for the calendar year 1924, for the overassessment of $20,995.68 for the year 1925 and for the overassessment of $3,791.26 for the year 1926, making a total deficiency of $101,269.87 and a total overassessment of $24,786.94 (see Exhibit A hereto attached).

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue has erred by including in the taxable income of the petitioner for the respective years in question, certain dividends declared by the United States Gypsum Company, an Illinois corporation, in which the petitioner is a stockholder, in the years 1924, 1925 and 1926, but which dividends were not received by the petitioner until the respective years following those in which declared, viz.: The Commissioner has erred by including in the taxable income of the petitioner for the calendar year 1924, dividends of $266,490.10 declared by said company in the year 1924 but not received by the petitioner until January, 1925. The Commissioner has erred by including in the taxable income of the petitioner for the year 1925, dividends of $161,511.70 declared by said company in the year 1925 but not received by the petitioner until January, 1926. The Commissioner has erred by including in the taxable income of the petitioner, dividends of $140,117.30 declared by said company in the year 1926 but not received by the petitioner until January, 1927.

(b) The Commissioner has erred by including said amounts in the taxable income of the petitioner in the years when said dividends were declared, and not in the years when said dividends were received by petitioner, and by including said dividends on the grounds of constructive receipt (see pages 1, 2, 3, 4 and 5 of Exhibit A hereto attached), and has thereby erred by determining a deficiency in petitioner's income tax for the calendar year 1924 of $101,269.87.

(c) The Commissioner has erred by increasing the taxable income of the petitioner for the year 1924 from $116,936.54, as returned by the petitioner, to $383,426.64, by adding to said $116,936.54 the amount of $266,491.10, the latter being the said dividends declared in 1924 but not received by petitioner until January, 1925; and has erred by decreasing the

taxable income of petitioner for the year 1925 from $569,959.67, as returned by the petitioner, to $464,981.27, by first adding to said $569,959.67 the amount of the dividends, $161,511.70, declared by said company in 1925 but not received by petitioner until January, 1926, and deducting the amount of $266,491.10 declared as dividends by said company in 1924 but not received by petitioner until January, 1925; and has erred by decreasing the taxable income of the petitioner for the year 1926 from $471,044.88, as returned by petitioner, to $452,291.42, by first adding to said amount of $471,044.88 the amount of $140,117.30, being the dividends declared by said company in 1926 but not received by the petitioner until January, 1927, and then deducting the amount of $161,511.70, being the dividends declared in 1925 but not received by the petitioner until January, 1926 (see Exhibit A hereto attached).

(d) The Commissioner has erred by

(1) increasing the income tax of petitioner for the year 1924 from $23,965.62, as returned and paid by petitioner, to $125,235.49, and by determining a deficiency for said year of $101,269.87, and

(2) determining an overassessment for the year 1925 of $20,995.68, and

(3) determining an overassessment for the year 1926 of $3,791.26.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is an individual stockholder in the United States Gypsum Company of Illinois, and said company has its principal office in Chicago, Illinois.

(b) The said United States Gypsum Company, by resolution of its Board of Directors, declared certain dividends upon its capital stock, by resolutions, copies of which are hereto attached and marked Exhibit B and made a part hereof; that the petitioner, at date of December 5, 1924, was the owner of 48,604 shares of the common capital stock and 2,302 shares of the preferred capital stock of said United States Gypsum Company; that petitioner, at the date of December 5, 1925, was the owner of 65,618 shares of the common capital stock and 2,302 shares of the preferred capital stock of said United States Gypsum Company; that petitioner, at the date of December 4, 1926, was the owner of 75,601 shares of the common capital stock and 2,306 shares of

the preferred capital stock of the said United States Gypsum Company.

(c) The petitioner, by reason of his said holdings of stock in said United States Gypsum Company on said dates, and by reason of the said resolutions set forth in Exhibit B hereto attached, was paid, according to the resolutions of November 12, 1924, the sum of $266,490.10, and according to the resolutions of November 12, 1925, the sum of $161,511.70, and according to the resolutions of November 10, 1926, the sum of $140,117.30, as dividends upon the said capital stock held by him.

(d) That the dividend checks of said United States Gypsum Company in payment of the dividends declared as set forth in Exhibit B hereto attached and made a part hereof, were mailed from the office of the company to its various stockholders on December 31st of each of the years 1924, 1925 and 1926 (see Exhibit A, page 2 of Deficiency Notice); and of the dividend checks so mailed, the following were received by petitioner as stated below:

(1) Checks of said company aggregating $266,490.10 in payment of said dividends declared on November 12, 1924, were received by the petitioner in January, 1925;

(2) Checks of said company aggregating $161,511.70 in payment of said dividends declared on November 12, 1925, were received by the petitioner in January, 1926;

(3) Checks of said company aggregating $140,117.30 in payment of said dividends declared on November 10, 1926, were received by the petitioner in January, 1927;

(4) Said petitioner did not receive any of said checks in payment of said dividends in the years in which said dividends were declared, but in each and every case said dividend checks and said dividends were received by the petitioner in the year following the year in which declared.

(e) The petitioner duly filed his income tax returns for the years in question and included in his taxable income the said amounts of said dividends in the respective years in which said dividend checks were received by him, as follows:

$266,490.10 in the year 1925,
$161,511.70 in the year 1926, and
$140,117.30 in the year 1927.

(f) The amounts of taxable income returned by petitioner for the respective years, and amounts of income tax paid by him thereon were:

Income, 1924, $116,936.54, tax, $23,965.62;

Income, 1925, $569,959.67, tax, $108,401.56;
Income, 1926, $471,044.88, tax, $85,764.85
(see Exhibit A attached hereto).

(g) The petitioner kept his books and accounts, prior to and during each of the years 1924, 1925 and 1926, in question, on the "cash receipts and disbursements" basis, and not on the "accrual" basis, and has filed his income tax returns on the same basis of cash receipts and disbursements and not on the accrual basis, and has kept his books and accounts and filed his income tax returns for said periods upon a calendar year basis.

(h) The petitioner relies upon the appropriate provisions of the Revenue laws of 1924 and of 1926, and upon the ground that neither the dividends in question nor the checks of the United States Gypsum Company in payment of the same were received by petitioner until the year respectively following the year in which declared, and upon the decisions of the United States Board of Tax Appeals in the following cases:

Appeal of Robert W. Bingham, 8 B. T. A. 603;
Appeal of H. L. Campbell, 8 B. T. A. 1076;
Appeal of Adnah McMurtrie, 8 B. T. A. 1301;
Appeal of Deposit Trust & Savings Bank, Executor of Estate of Enoch Stott, promulgated April 28, 1928, Docket 12195.

6. Wherefore the petitioner prays that the Board may hear this proceeding and grant to the petitioner relief from the deficiency asserted by the respondent, and in the following and each of the following particulars:

(a) That there be not included in the taxable income of the petitioner for the year 1924 the sum of $266,490.10, being the amount of the dividend declared by the United States
7 Gypsum Company on November 12, 1924, as aforesaid, but not received by petitioner until January, 1925, and that the net income of the petitioner for 1924 be determined to be $116,936.54, as returned by the petitioner for said year; that there be no deficiency in tax determined against the petitioner for the year 1924.

(b) That the net taxable income of the petitioner for each of the years 1924, 1925 and 1926 be determined to be as returned by the petitioner as hereinbefore set forth.

(c) That the correct tax for each of the years 1924, 1925 and 1926 be determined to be as stated heretofore herein to have been paid by said petitioner.

(d) And such further relief as the petitioner may be by law entitled.

12 EXHIBIT A.

TREASURY DEPARTMENT
Washington

Jun 28 1928

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
and refer to
IT:AR:B-1
FMAL60D

Mr. Sewell Lee Avery,
300 West Adams Street,
Chicago, Illinois.

Sir:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the years 1924 to 1926, inclusive, discloses a deficiency of $101,269.87 for the year 1924 and an overassessment of $24,786.94 for the years 1925 and 1926 as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,
Commissioner.

By .....
Deputy Commissioner.

Inclosures:
Statement
Form A
Form 882
emb-1

13 Statement

IT:AR:B-1 Jun 28 1928

FMA:60D In re: Mr. Sewell Lee Avery,
300 West Adams Street,
Chicago, Illinois.

Year	Deficiency	Overassessment
1924	$101,269.87	
1925		$20,995.68
1926		3,791.26
1926		
Totals	$101,269.87	$24,786.94

Reference is made to the conference held in this office with your representative, Mr. Morris L. Johnston, on May 29, 1928, in regard to the contentions as set forth in your letter dated May 2, 1928, relative to the proposed adjustments in your tax liability for the years 1924 to 1926, inclusive, as outlined in office letter of April 30, 1928.

You are advised that the inclusion of the dividends from the United States Gypsum Company in your gross income for the years in which such dividends were declared and made payable on the grounds of constructive receipt, rather than the years in which such dividends were actually reduced to possession, as claimed by you, is strictly in accordance with the consistent rulings of this office with respect to the question at issue. In this connection you are referred to Office Decision 97 reported in Internal Revenue Cumulative Bulletin, December 1919, Page 79 and Income Tax Unit Ruling 2072 reported in Internal Revenue Cumulative Bulletin III-2, Page 76. You are further informed that the Commissioner of Internal Revenue does not acquiesce in the adverse decisions of the United States Board of Tax Appeals as relied upon by you, namely:

Appeal of Robert W. Bingham, 8 B. T. A. 603,
Appeal of H. L. Campbell, 8 B. T. A. 1076,
Appeal of Adnah McMurtie, 8 B. T. A. 1301,
Appeal of Deposit Trust and Savings Bank, Executor, Estate of Enoch Stott, promulgated April 19, 1928, Docket #12195.

In view of the foregoing, your protest must be denied.

1924

Net income disclosed by your return		$116,936.54
Add:		
1. Dividends		266,490.10
Adjusted net income		$383,426.64
14 Less:		
Dividends	$364,340.05	
Personal exemption and credit for dependents	2,900.00	367,240.05
Income subject to normal tax		$ 16,186.59

Computation of Tax

Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $8,186.59		491.39
Surtax on $383,426.64		124,556.39
Total tax		$125,287.59
Less:		
Earned income credit	$51.00	
Tax paid at source	1.10	52.10
Net tax assessable		$125,235.49
Tax previously assessed		23,965.62
Deficiency in tax		$101,269.87

Explanation of Change

1. This item represents a cash dividend declared and made payable by the United States Gypsum Company, on or before December 31, 1924, checks for which were prepared and mailed by the corporation to the various stockholders on that date. It is, therefore, held in accordance with Articles 52 and 1541 of Regulations 65 relating to the Revenue Act of 1924, that this cash dividend was unqualifiedly made subject to your demand on December 31, 1924, and is deemed to have been constructively received by you in the year 1924. In this connection you are informed that the decisions by the United States Board of Tax Appeals in the cases of Robert

W. Bingham and Adanah McMurtie, referred to in your protest of February 9, 1928, have not been acquiesced in by the Commissioner of Internal Revenue.

1925

Net income disclosed by your return		$569,959.67
Add:		
1. Dividends increased		161,511.70
Total		$731,471.37
Deduct:		
2. Dividends decreased		266,490.10
Adjusted net income		$464,981.27
Less:		
Dividends	$417,653.60	
Personal exemption and credit for dependents	3,900.00	421,553.60
Income subject to normal tax		$ 43,427.67

Computation of Tax

Normal tax at 1½% on $4,000.00		$ 60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $35,427.67		1,771.38
Surtax on $464,981.27		84,656.25
Total tax		$ 86,607.63
Less:		
Earned income credit	$201.25	
Tax paid at source	0.50	201.75
Net tax assessable		$ 86,405.88
Tax previously assessed		107,401.56
Overassessment		$ 20,995.68

Explanation of Charges

1. This item represents a cash dividend declared and made payable by the United States Gypsum Company on or before December 31, 1925, and has been included in the gross income for the year 1925 for the reason explained under Explanation #1 for the year 1924.

2. This dividend has been included in the gross income for the year 1924 and is, therefore, deducted here.

1926

Total net income disclosed by your return		$471,044.88
16 Add:		
1. Dividends increased	$140,117.30	
2. Contributions disallowed	2,100.00	
3. Increases in profit from sale of real estate	540.94	142,758.24
		$613,803.12
Deduction:		
4. Dividends decreased		161,511.70
Adjusted total net income		$452,291.42
Less:		
5. Capital net gain as corrected		1,189.28
Ordinary net income		$451,102.14
Less:		
Dividends	$453,722.26	
Interest on United States obligations	21.84	
Personal exemption and credit for dependents	3,900.00	457,644.10
Income subject to normal tax		None

Computation of Tax

Normal tax		None
Surtax on $451,102.14		$ 81,880.43
12½% tax on capital net gain of $1,189.28		148.66
Total tax		$ 82,029.09
Less:		
Earned income credit	$55.00	
Tax paid at source	0.50	55.50
Net tax assessable		$ 81,973.59
Tax previously assessed		85,764.85
Overassessment		$ 3,791.26

Explanation of Changes

1. This item represents a cash dividend declared and
17 made payable by the United States Gypsum Company on or before December 31, 1926, which has been included in the gross income for the year 1926 for the reason explained under Change #1 for the year 1924. Articles 52 and 1541 of Regulations 69 are applicable to this year.

2. The following contributions have been disallowed as deductions from the gross income for the year 1926 for the reason that they were not made to organizations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual:

Chicago Crime Commission	$1,000.00
Chicago Bureau of Public Efficiency	500.00
Plant of Chicago (Commercial Club)	500.00
Port of Chicago (Commercial Club)	100.00
Total contributions disallowed	$2,100.00

3. This adjustment is explained as follows:

Cost of land purchased by you in 1919	$1,059.06
Selling price received in 1926	1,600.00
Profit taxable in 1926	$ 540.94

4. This dividend was included in the gross income for the year 1925 and is, therefore, deducted here.

5. The correct capital net gain is as follows:

Amount reported in Schedule D of your return	$ 648.34
Increase explained under Change #3 above	540.94
Corrected capital net gain	$1,189.28

The overassessments shown herein will be made subjects of Certificates of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

The right of petition as indicated on Page 1 of this letter refers only to any deficiency in tax indicated herein, inasmuch as there is no provision in the Revenue Act of 1926 grant-
18 ing the right of petition against the determination of any overassessment found upon a review of your return.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

emb-1

8 EXHIBIT B.

Excerpts of the Minutes of Regular Meeting of the Board of Directors of the United States Gypsum Company, Held at the Office of the Company, 205 West Monroe Street, Chicago, Illinois, on Wednesday, November 12, 1924, at 10:15 o'Clock A. M.

Resolved: That an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account, and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1924.

Be It Resolved, That an amount equal to two (2%) per cent on the common stock outstanding at the close of business on December 5, 1924 be transferred to the dividend account as a regular cash dividend, and that this amount be paid to the common Stockholders of record at the close of business on that date, on or before December 31, 1924.

Be It Further Resolved, That an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account, and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

9 Excerpts of the Minutes of Regular Meeting of the Board of Directors of the United States Gypsum Company, Held at the Office of the Company, 205 West Monroe Street, Chicago, Illinois, on Thursday, November 12, 1925, at 10:00 o'Clock A. M.

Resolved: That an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account, and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1925.

Resolved, That an amount equal to 2% on the common stock

outstanding at the close of business on December 5, 1925 be transferred to the dividend account as a regular cash dividend, and that this amount be paid to the common Stockholders of record at the close of business on that date, on or before December 31, 1925.

Resolved, That an amount equal to $2.00 per share on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account, and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1925.

10 Excerpts of the Minutes of the Regular Meeting of the Board of Directors of the United States Gypsum Company, Held at the Office of the Company, 205 West Monroe St., Chicago, Illinois, on Wednesday November 10th, 1926, at 10:00 A. M.

Resolved: That an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 4th, 1926, be transferred to the dividend account, and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1926.

Resolved: That an amount equal to 2% on the common stock outstanding at the close of business on December 4th, 1926 be transferred to the dividend account as a regular cash dividend, and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1926.

Resolved, That an amount equal to $1.40 per share on the common stock outstanding at the close of business on December 4, 1926, be transferred to the dividend account, that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1926.

11 MORRIS L. JOHNSTONE
Counsel for Petitioner
134 South LaSalle Street, Chicago, Illinois

State of Illinois }
County of Cook } ss.

SEWELL LEE AVERY, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true except as to those facts stated to be upon information and belief, and those facts he believes to be true.

SEWELL LEE AVERY

Subscribed and Sworn To before me this 11th day of August, A. D. 1928.

HAROLD D. BURGESS
Notary Public

(Seal)

19 (Caption 40238)

ANSWER.

nent of
lence, filed
e 3, 1933.

Filed Oct. 6, 1928.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1, 2. Admits the allegations in paragraphs 1 and 2.

3. Admits that the taxes in controversy are individual income taxes of the petitioner for the calendar year 1924. Denies the remaining allegations in paragraph 3 and says that the Board has no jurisdiction over the years 1925 and 1926 for the reason that it appears from the petition and exhibits annexed thereto that no deficiency has been asserted for those years.

5, (a), (b), (c), (d) For lack of information upon which to base a belief, denies the allegations in paragraphs 5, (a), (b), (c) and (d).

5, (e) Admits that on to wit: March 15, 1925, petitioner filed with the Collector of Internal Revenue for the First District of Illinois, what purports to be an income tax return for the calendar year 1924. Denies the remaining allegations in paragraph 5, (e).

5, (f) Admits that the amount shown as net income on said

return for the year 1924 was $116,936.54. Denies the remaining allegations in paragraph 5, (f).

5, (g) For lack of information upon which to base a belief, denies the allegations in paragraph 5, (g).

5, (h) Denies the allegations in paragraph 5, (h).

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) C. M. CHAREST
General Counsel, Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney, Bureau of Internal Revenue.

jdf/10/5/28

ient of ence, filed e 3, 1933.

47 (Caption)

I

STATEMENT OF EVIDENCE.

Filed June 3, 1933.

The following is a statement of all of the evidence submitted to the Board of Tax Appeals in the above named case reduced in narrative form.

The following facts were stipulated:

1. The petitioner in the above cause is an individual and at all material times herein is and was a citizen of the United States and a resident of the City of Evanston, County of Cook and State of Illinois.

2. Petitioner is and at all material times herein was, a stockholder of United States Gypsum Company, an Illi-
48 nois corporation with its principal office at No. 300 West Adams Street, Chicago, Illinois, formerly No. 205 West Monroe Street, Chicago, Illinois, owning a minority number of the preferred and common shares of the capital stock of said corporation. Petitioner is and at all of said times was President of said corporation.

3. Petitioner has always kept his accounts and has reported his income upon a cash receipts and disbursements basis and upon a calendar year basis.

4. The Commissioner has determined a deficiency for the year 1924 of $101,269.27, an overassessment for the year 1925 of $20,995.68, an overassessment for the year 1926 of $3,791.26 and a deficiency for the year 1929 of $2,658.13.

5. In determining the said deficiency of $101,269.27 for the year 1924, the Commissioner increased the taxable income reported by the petitioner for said year by the amount of $266,490.10, representing certain dividends received by the petitioner as a stockholder of said United States Gypsum Company.

6. The said dividends of $266,490.10 were paid pursuant to a resolution of said corporation duly adopted on
49 November 12, 1924, residing as follows:

"Resolved that an amount equal to one and three-quarters (1¾%) per cent. on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

The said dividends of $266,490.10 were reported by the petitioner in his income tax return for the calendar year 1925.

7. On November 12, 1925, the said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 1-3 4% on the preferred stock outstanding at the close of business on December 5, 1925 be transferred to the dividend account and that this amount be paid to the preferred stockholders of record
50 at the close of business on that date, on or before December 31, 1925;

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 5,

1925 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1925;

"Resolved that an amount equal to $2.00 per share on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1925."

Petitioner received dividends from said corporation, amounting to $161,511.70, pursuant to the last mentioned resolution. Petitioner reported the amount of said dividends in his tax return for the year 1926.

8. In determining the overassessment of $20,995.68 for the year 1925, the Commissioner increased petitioner's taxable income for said year by the amount of said dividends of $161,511.70, and decreased petitioner's taxable income by the amount of said dividends of $266,490.10.

9. On November 10, 1926, the said United States Gypsum Company adopted the following resolution:

"Resolved that an amount equal to 1-3/4% on the preferred stock outstanding at the close of business on December 4th, 1926, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1926;

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 51 4th, 1926, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1926;

"Resolved that an amount equal to $1.40 per share on the common stock outstanding at the close of business on December 4, 1926, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1926.

Petitioner received dividends amounting to $140,117.30 from said corporation pursuant to said last mentioned resolution, which said dividends were included by the petitioner in his return for the year 1927.

10. In determining the said overassessment for the year

1926, amounting to $3,791.26, the Commissioner increased the petitioner's taxable income for 1926 by the amount of said dividends of $140,117.30 and decreased the petitioner's taxable income by the amount of the said dividends of $161,511.70.

11. On November 14, 1928, the said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

52 "It Is Also Resolved that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Petitioner received dividends amounting to $32,656 from said corporation under the last mentioned resolution.

12. On November 13, 1929, said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"It Is Also Resolved that for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Petitioner received dividends amounting to $48,984 from said corporation pursuant to said last mentioned resolution.

13. In determining the deficiency for the said year 1929, amounting to $2,658.13, the Commissioner increased the petitioner's taxable income by the amount of said dividends of $48,984.00 and decreased the petitioner's taxable

53 income by the amount of said dividends of $32,656. Petitioner included the said dividends of $48,984.00 in his return for the year 1930 and had included the said dividends of $32,656.00 in his return for the year 1929.

14. The said dividends of $266,490.10 received by the petitioner pursuant to the resolution adopted on November 12, 1924, were paid to the petitioner by the check or checks of

said United States Gypsum Company, which checks were actually received by the petitioner in January, 1925, on, to-wit, January 2, 1925. The said dividends of $161,511.70 received pursuant to the resolution of November 12, 1925 were paid to the petitioner by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1926, on, to-wit, January 2, 1926. The said dividends of $140,117.30 received by the petitioner pursuant to the resolution of November 10, 1926 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1927, on, to-wit, January 2, 1927. The said dividends of $32,656.00 received by the petitioner pursuant to said resolution of November 14, 1928 were paid by the check or checks of said corporation, which checks were actually received by the petitioner in January, 1929, on, to-wit, January 2, 1929. The said dividends of $48,984.00
54 received by the petitioner pursuant to the resolution of November 13, 1929 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1930, on, to-wit, January 2, 1930.

Thereupon MR. GEORGE W. CLARKE, a witness called by and on behalf of the petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination.

My name is George W. Clarke. I reside at 4417 Wrightwood Avenue. I am Assistant Treasurer of United States Gypsum Company, and have been since 1920. The matter of sending out dividend checks for distribution was handled in my department, the treasury department. The practice, methods and procedure of United States Gypsum Company with reference to sending out dividend checks during the period from 1924 to 1930, both inclusive, is as follows:

The treasury department receives a complete list of the stockholders from the secretary, indicating the number of shares, the address of the stockholders and the amount in dividends. On receipt of that list the treasury department
55 turns over the dividend checks in blank to the addressograph department which department imprints upon the checks, from the stockholders' list, the name and address

of the stockholder. The checks are then re-delivered to the treasury department where they are signed but without the amount. The check numbers are then imprinted on the stockholders' list. The checks are then filled in and signed, whereupon they are totalled and balanced with the dividend list. After they are balanced, the checks, which are in sheets of five, are torn apart, are dated and inserted in the envelopes. They are then mailed on the last business day of the month, it has always been the 31st or 30th, depending on the month, the number of days in the month, and the checks are always turned over to the mailing department in the afternoon, usually anywhere from 1:00 to 3:00 o'clock.

The mailing department seals the envelopes, imprints the permit number on the envelope for mailing and, in many cases, they are carried over to the post office; many times it has been necessary for them to work until 6:00 or 7:00 o'clock and then carry them to the post office.

Sometimes they are taken over by the mail delivery man, not the mail man, but a trucking company that carries our mail to the post office. There have been occasions when they have been carried to the post office in a taxicab, when they worked overtime. I don't think they ever left the company's office before about 6:00 o'clock.

The list is usually received from the secretarial department anywhere from the 20th to the 22nd of the month and of course the work of the treasury department starts when the list is received from the secretarial department.

During the years 1924 to 1929, the dividend checks have never left the treasury department until the afternoon of the last day of the month.

There are a few dividend checks not sent out through the mail. I would say approximately fifty stockholders who are employees of the company; they work right in the Chicago general office, and those checks always have been, since I have ever had anything to do with the dividends, held in the office until the first business day of the next month and then distributed to the employees through the office mail.

Mr. Avery's dividend checks have always been delivered to his secretary on the first day of the following month. The practice to which I have been testifying has continued ever since I have been assistant treasurer.

57 *Cross-Examination.*

In the case of a dividend declared to be payable on or before December 31st of a certain year, Mr. Avery's check would always be delivered on the first business day of the following month. That is very definitely true, to my own personal knowledge, with reference to the years here under consideration—1924 to 1929. That has always been the fact. There has been no exception with regard to any stockholder, whether or not he be an employee or officer of the company. None received their checks before the first business day following the month in which they are made payable. That is the practice.

Our dividends are quarterly dividends and are always payable on or before the last day of the month, the 30th or 31st, whichever it happens to be. In the cases referred to as being on or before the 30th, that would always be the last day of the month. If there were thirty days in the month, the resolution would be on or before the 30th of the month, and if thirty-one days in the month, the resolution read payable on or before the 31st of December. It has always been the practice to mail the dividend checks on the last day of the month so that they would be in the stockholders' hands on the first business day of the month.

58 Thereupon MR. A. W. IRWIN, called as a witness by and on behalf of the petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination.

My name is A. W. Irwin. I reside at 7726 North Ashland Avenue, Chicago. I am employed by United States Gypsum Company, in charge of the secretarial department. I have been occupying that position since August 1, 1931. I have been working on the books in the secretarial department since August 1, 1931.

I have made an examination of the books as to the amount of stock of United States Gypsum Company and the amount of Mr. Avery's holdings on the various dates mentioned in these resolutions.

The total common and preferred stock outstanding and Mr. Avery's holdings on the dates mentioned are as follows:

Date	Common Shares	Pref. Shares	Mr. Avery's Holdings Common	Preferred
Dec. 5, 1924	325,397	84,649	48,604	2,302
Dec. 5, 1925	440,723	82,772	65,618	2,302
Dec. 15, 1928	760,436	77,281	81,640	2,306
Dec. 14, 1929	1,149,315	75,417	122,460	2,306

59 There was no cross-examination of the witness.

No further testimony was offered by either the petitioner or the respondent.

Thereupon counsel for the respondent stated that he was willing to concede that the facts were as testified to by Mr. Clarke.

May 10, 1933.

LELAND K. NEEVES,
Attorney for Petitioner.

60 Approved and Ordered Filed this 3rd day of June, 1933. C. M. Trammell Member (s).

21 * * (Caption 40238 and 62783) * *

Docket Nos. 40238
62783

Leland K. Neeves, Esq., for the petitioner.
Chester A. Gwynn, Esq., for the respondent.

MEMORANDUM OPINION.

Trammell: In the petitions filed in these proceedings, which were consolidated for hearing, the petitioner alleges error on the part of the respondent in determining deficiencies and overassessments as follows:

Docket No.	Year	Deficiency	Overassessment
40238	1924	$101,269.87	
	1925		$ 20,995.68
	1926		3,791.26
62783	1929	2,658.13	

Inasmuch as the respondent has not determined deficiencies in tax for 1925 and 1926 we do not have jurisdiction with
22 respect to such years. The proceeding in Docket No. 40238 will be dismissed in so far as it relates to a deter-

mination of the petitioner's tax liability for those years. *Cornelius Cotton Mills*, 4 B. T. A. 255.

The only matter presented for determination with respect to the years 1924 and 1929 is the correctness of the respondent's action in including in the petitioner's taxable income for such years certain dividends on corporate stock owned by the petitioner which were declared in such years, which were payable on December 31 of such years and checks for which were not actually received by petitioner until January 2 of the years following. In addition to certain testimony the proceedings were submitted on a stipulation of facts, pertinent portions of which are as follows:

> The petitioner in the above causes is an individual and at all material times herein is and was a citizen of the United States and a resident of the City of Evanston, County of Cook and State of Illinois.
>
> Petitioner is and at all material times herein was, a stockholder of the United States Gypsum Company, an Illinois corporation with its principal office at No. 300 West Adams Street, Chicago, Illinois, formerly No. 205 West Monroe Street, Chicago, Illinois, owning a minority number of the preferred and common shares of the capital stock of said corporation. Petitioner is and at all of said times was President of said corporation.
>
> Petitioner has always kept his accounts and has reported his income upon a cash receipts and disbursements basis and upon a calendar year basis.
>
> The Commissioner has determined a deficiency for the year 1924 of $101,269.27, * * * and a deficiency for the year 1929 of $2,658.13.
>
> In determining the said deficiency of $101,269.27 for the year 1924, the Commissioner increased the taxable income reported by the petitioner for said year by the amount of $266,490.10, representing certain dividends received by the petitioner as a stockholder of said United States Gypsum Company.

23 The said dividends of $266,490.10 were paid pursuant to a resolution of said corporation duly adopted on November 12, 1924, reading as folllows:

> "RESOLVED that an amount equal to one and three-quarters (1¾%) per cent. on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close

of business on that date, on or before December 31, 1924;

"BE IT FURTHER RESOLVED that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"BE IT FURTHER RESOLVED that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

The said dividends of $266,490.10 were reported by the petitioner in his income tax return for the calendar year 1925.

* * * * * * *

On November 14, 1928, the said United States Gypsum Company duly adopted the following resolution:

"RESOLVED that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

"IT IS ALSO RESOLVED that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Petitioner received dividends amounting to $32,656.00 from said corporation under the last mentioned resolution.

24 On November 13, 1929, said United States Gypsum Company duly adopted the following resolution:

"RESOLVED that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"IT IS ALSO RESOLVED that for the purpose of the fore-

going, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Petitioner received dividends amounting to $48,948.00 from said corporation pursuant to said last mentioned resolution.

"In determining the deficiency for the said year 1929, amounting to $2,658.13, the Commissioner increased the petitioner's taxable income by the amount of said dividends of $48,984.00 and decreased the petitioner's taxable income by the amount of said dividends of $32,656. Petitioner included the said dividends of $48,984.00 in his return for the year 1930 and had included the said dividends of $32,656.00 in his return for the year 1929.

The said dividends of $256,490.10 received by the petitioner pursuant to the resolution adopted on November 12, 1924, were paid to the petitioner by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1925, on, to-wit, January 2, 1925. * * * The said dividends of $32,656.00 received by the petitioner pursuant to said resolution of November 14, 1928 were paid by the check or checks of said corporation, which checks were actually received by the petitioner in January, 1929, on, to-wit, January 2, 1929. The said dividends of $48,984.00 received by the petitioner pursuant to the resolution of November 13, 1929 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1930, on, to-wit, January 2, 1930.

The practice followed by the United States Gypsum Company in the distribution of its dividend checks for the
25 years 1924 through 1929 was as follows: The treasurer's department which has supervision of the matter received from the secretary a complete list of the stockholders, showing the number of shares and the addresses of the stockholders and the amounts to which they were entitled. Upon receipt of the list, the treasurer's department turned over to the addressograph department blank checks upon which were printed the names of the stockholders respectively and their addresses. The checks were then returned to the treasurer's department. The checks were then signed with the amount of the check still in blank and the check numbers were imprinted upon the stockholders' list. The amount of each

check was then filled in and the checks were totalled and balanced with the dividend list. They were then separated, the checks up to that time being in sheets of five, were dated and inserted in their envelopes.

The checks were turned over to the mailing department in the afternoon anywhere from one to three o'clock. The mailing department sealed the envelopes, stamped the permit number on the envelopes for mailing, and took the envelopes to the post office. The checks never left the mailing department before six o'clock. In many instances it was necessary for the mailing department to work until six or seven o'clock and then take the checks to the post office. Usually the envelopes containing the checks were taken to the post office by a trucking company that took the company's mail to the post office and upon some occasions when the mailing department had worked overtime, the checks were taken to the post office in a taxi cab.

26 The stockholders' or dividend list was usually received from the secretarial department by the treasurer's department anywhere from the 20th to the 22nd of the month. The work of the treasurer's department started when the list was received from the secretarial department. The dividend checks never left the treasurer's office or were sent to the mailing department until the afternoon of the last day of the month, and the checks were mailed on the last day of the month so as to be in the stockholders' hands on the first business day of the following month.

Dividends were payable quarterly and in every instance they were made payable on or before the last day of the month, the 30th or 31st, depending upon the month.

In the case of certain of the stockholders who were employees of the company, at the Chicago general office, including the petitioner, approximately fifty in number, the dividend checks were not mailed but were held in the treasurer's office until the first business day of the following month and were then distributed to the employees through the office mail. The petitioner's dividend checks were always delivered to his secretary on the first business day of the following month. The practice was without exception that no stockholder, whether employee or officer, receive his check before the first business day of the month following the month in which the dividends were made payable.

27 The number of shares of stock of the United States Gypsum Company outstanding and the number of shares

owned by the petitioner were as follows on the dates indicated:

Date	Common Stock Shares Outstanding	Common Stock Shares Owned by Petitioner	Preferred Stock Shares Outstanding	Preferred Stock Shares Owned by Petitioner
Dec. 5, 1924.....	325,397	48,604	84,649	2,302
Dec. 5, 1925.....	440,723	65,618	82,772	2,302
Dec. 15, 1928.....	760,436	81,640	77,281	2,306
Dec. 14, 1929.....	1,149,315	122,406	75,417	2,306

The petitioner contends that under the circumstances here presented the respondent erred (1) in including in taxable income for 1924 the dividends of $266,490.10 declared by the corporation on November 12, 1924 payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924 and the check or checks for which were not actually received by the petitioner until on January 2, 1925 and (2) in including in taxable income for 1929 the dividends of $48,984 declared by the corporation on November 13, 1929 payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929 and the check or checks for which were not received by the petitioner until on January 2, 1930. The respondent contends that his action was correct and should be sustained.

The petitioner contends that under the Revenue Acts of 1924, 1926 and 1928 the time of the actual receipt of dividends determines the year in which they are to be subject to
28 tax and that since the checks for the dividends in controversy were actually received by him in the years following those in which the respondent seeks to tax them the respondent's action should be reversed.

The pertinent provisions of the Revenue Act of 1924 are as follows:

> SEC. 213. For the purposes of this title * * *
>
> (a) The term "gross income" includes * * * income derived from * * * dividends * * * The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.
>
> SEC. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer;

In so far as here material the pertinent portions of the Revenue Acts of 1926 (Secs. 212 and 213) and 1928 (Sections 22, 41 and 42) are substantially the same as the foregoing provisions of the Revenue Act of 1924.

Respecting the time when dividends are to be included in gross income neither the Revenue Act of 1924 nor the subsequent Acts contain the same or a similar provision to that contained in section 201 (e) of the Revenue Act of 1921 to the effect that "a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands." The petitioner pointing to the omission in the later acts of the provision contained in section 201 (e) of the Act of 1921 and relying on the statements of the court in *Commissioner* v. *Cecil Q. Adams*, 54 Fed. (2d) 228, Circuit Court of Appeals, First Circuit, in affirming 20 B. T. A. 243 urges that we reconsider the decisions which we have rendered since our decision in the *Adams* case and which involved the time for including in income under the 1924 and later Acts dividends received under circumstances similar to those here presented.

In *Cecil Q. Adams*, *supra*, there was involved the question of the inclusion in the taxpayer's gross income for the calendar year 1924 the amount of a dividend which was declared on December 26, 1924 by a resolution which stated "Check for same to be mailed December 31, 1924" where the taxpayer, who kept his books and reported his income for each calendar year on the basis of cash received and disbursed, received a check for his dividend in due course on January 2, 1925. We there considered the legislative history relating to the omission from the Act of 1924 of the above quoted provision contained in section 203 (e) of the Revenue Act of 1921 and said:

> Clearly, Congress intended that even under the 1924 Act there might be a constructive receipt of dividends which would make such dividends taxable to the stockholder prior to the date upon which he actually received them. In this Act, Congress apparently abandoned a specific provision that all items of gross income would be taxable in the year in which unqualifiedly made subject to the demands of the taxpayer, because it considered that such would be the rule followed even in the absence of a statutory provision. In other words, Congress believed that there were some cases in which the courts

would and should hold that income was constructively received under well established rules of law and no enlargement of these rules was necessary. Each case in which the Commissioner attempts to apply the rule of constructive receipt will depend upon its own facts as to whether or not there is justification for the application of such a rule. But, in general, income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose. Cf. *John A. Brander, supra; Robert W. Bingham*, 8 B. T. A. 603.

Inasmuch as the resolution declaring the dividends expressly provided that checks should be mailed on December 31, 1924, as the language was purposely inserted in such resolution and as there was no other time of payment fixed and no other method of payment authorized we concluded that the dividend was not unqualifiedly subject to the demand of the taxpayer in 1924 and therefore was not to be included in the petitioner's taxable income for 1924.

In affirming our decision the Circuit Court of Appeals said:

> The Board of Tax Appeals in its opinion distinguished the present case from that of *Commissioner v. Bingham*, 35 Fed. (2d) 503, 281 U. S. 729, 50 S. Ct. 246, on the ground that the latter arose under the Revenue Act of 1921 (42 Stat. c. 136), which contained a provision in Sec. 201 (e) that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands"; and on the further ground that the resolution, above referred to, fixed the time of payment as of December 31, 1924, and the method of payment to be by check, mailed on that day; and fixed no other time of payment and authorized no other method.
>
> The case of *Commissioner v. Bingham, supra*, is clearly distinguishable from the present one, for the reason that the tax there in question was governed by the Revenue Act of 1921, in which Sec. 201 (e) expressly provides that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands," which provision the Act of 1924 does not contain.
>
> The Act of 1924 not only does not contain the above provision, but in Section 213 (a) expressly provides that

dividends "shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of Section 212," with which exception we are not concerned.

The applicable provisions of Section 213 (a) are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the Act is unambiguous and its meaning plain, is to be gathered from the Act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this Act speaks
31 for itself; it does not call for construction. And on this ground alone, we think that the Board of Tax Appeals did not err in reaching the conclusion that it did.

We are also of the opinion that, on the facts found, the dividends were not "unqualifiedly made subject to the demand of the stockholder," in the year 1924, if Art. 52 of the Departmental Regulations can be said to be valid and not in conflict with the express language of Sec. 213 (a).

The petitioner contends that under the language used by the court there is no authority in the Revenue Acts of 1924, 1926 and 1928 for including in taxable income dividends received under the circumstances here involved.

Subsequent to our decision in the *Adams* case and prior to the affirmance thereof by the Circuit Court of Appeals we decided *Mary Miller Braxton*, 22 B. T. A. 182 which arose under the Revenue Act of 1926. The *Braxton* case involved the inclusion in income for 1927 by a taxpayer on the cash receipts and disbursements and calendar year basis of dividends declared in that year, the checks in payment of which were dated and mailed December 31, 1927 but not actually received by the taxpayer until January 2, 1928. After again reviewing the legislative history relating to the omission from the later Revenue Acts of the provisions contained in section 203 (e) of the Revenue Act of 1921 we said:

From these reports and the various stages of the bill, it is clear that the legislative intent was that gross income should continue to include the items covered by section 201 (e) of the 1921 Act, and that the general lan-
32 guage of the statute was sufficient to express this intent. We think the language of the 1924 and 1926 Acts is entirely susceptible of this construction, or, to put it

contrariwise, we think that the language used does not clearly exclude such items from gross income, and hence that the actual intention may properly be effectuated by the application of the general language to dividends, when subject to demand. These dividends were payable in 1927, and, as held generally in the *Bingham* case, *supra*, were, therefore, in the absence of evidence to the contrary, receivable by the stockholder on mere demand and hence constructively received.

In distinguishing our decision in that case from that in the *Adams* case we said:

> *Cecil Q. Adams*, 20 B. T. A. 243, contained an important difference—the dividend was only payable by a check to be mailed December 31, and hence the stockholder had no right to demand payment otherwise before receipt by mail.

Subsequent to the decision of the Circuit Court of Appeals in the *Adams* case we decided the case of *Effie B. Shearman*, 26 B. T. A. 716 which arose under the Revenue Act of 1928. There dividends were declared in 1928 payable on December 31, 1928 to stockholders of record "at the close of business on that day." Checks dated December 31, 1928 were mailed on that date to and were received on January 2, 1929 by the taxpayer who reported her income on the cash receipts and disbursements basis. Folllowing our decision in the *Braxton* case we held the dividends to be taxable in 1928.

Franklin J. Matchette, 26 B. T. A. 909 involved the question of the taxability in 1924 of dividends declared December 20, 1924, payable December 31, 1924 to stockholders of record on December 15, 1924 the check in payment of which was mailed on December 31, 1924 and received between January 2, and January 7, 1925 by the taxpayer who filed his returns on a cash receipts and disbursements basis. Following our decisions in the *Braxton* and *Shearman* cases we held the dividends to be taxable in 1924.

While we recognize that our holdings in the *Braxton*, *Shearman* and *Matchette* cases are not in harmony with some of the language used by the court in the *Adams* case we are, however, of the opinion that our view expressed in the *Braxton* case and followed in the later cases, "that the legislative intent was that gross income should continue to include the items covered by section 201 (e) of the 1921 Act" is sound and should continue to be followed. With due deference to

the view expressed by the Circuit Court of Appeals for the First Circuit in the *Adams* case we must say that our decisions are reviewable by all of the Circuit Courts of Appeal and until others speak on this question we do not feel that we should abandon the view which we have heretofore adopted and followed.

The facts in the instant proceedings are almost identical with those in the *Braxton, Shearman* and *Matchette* cases. In those cases checks for the dividends were mailed to the taxpayers. In these proceedings they were not mailed on December 31 of the respective years to the taxpayer, who according to the pleadings and stipulated facts had the same business address as the corporation, but were delivered to him the following business day through the "office mail." This difference is not material, for as was said in the *Matchette* case the voluntary mailing of a dividend check by
34 a corporation has no special legal significant. The dividends in controversy were declared in 1924 and 1929 respectively and were payable on December 31 of such years. On the dates the dividends were payable the petitioner had a legal right to demand and receive payment thereof in cash. The fact that he did not choose to exercise such right but waited for the delivery of checks to him in the following years did not in any wise destroy such right. *Commissioner v. Bingham*, 35 Fed. (2d) 503. On the facts before us we are of the opinion that the dividends were receivable by the petitioner on the dates payable. Being thus receivable on such dates they were constructively received by the petitioner during the taxable years in controversy and therefore were subject to tax in such years. We perceive no error in the respondent's action and accordingly it is sustained.

JUDGMENT WILL BE ENTERED FOR THE RESPONDENT.

Enter:

Entered Feb 2 1933

35 (Caption 40238) Entered 1933.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 2, 1933, it is

Ordered and Decided: That there is a deficiency of $101,269.87 for the year 1924; and that the proceeding in so far

as it relates to the years 1925 and 1926 is hereby dismissed for want of jurisdiction.

Enter:

CHARLES M. TRAMMELL
(Signed) Charles M. Trammell
(Seal) *Member.*

Entered Feb 2 1933

25. 36 * * (Caption 40238) * *

PETITION FOR REVIEW OF BOARD DECISION.

Filed April 25, 1933.

Petition of Sewell Le Avery for Review by the United States Court of Appeals for the Seventh Circuit of a Decision by the United States Board of Tax Appeals.

Sewell Lee Avery, the petitioner in this cause, by Leland K. Neeves, counsel, hereby files his petition for a review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision by the United States Board of Tax Appeals rendered on February 2, 1933 in the above cause, determining a deficiency in the petitioner's federal in-
37 come taxes for the calendar year 1924, in the amount of $101,269.27, and respectfully shows:

I.

The petitioner is an individual and resides in the City of Evanston, County of Cook and State of Illinois, with his business address at No. 300 West Adams Street, Chicago, Illinois.

The petitioner being aggrieved by the said decision and final determination of the Board of Tax Appeals in the above entitled cause desires a review thereof in accordance with the provisions of the Revenue Act of 1926 as amended and/or applicable statutes by the United States Circuit Court of Appeals for the Seventh Circuit whereof the petitioner is an inhabitant.

II.

Nature of the Controversy.

The petitioner reported his income to the Commissioner of Internal Revenue for federal income tax for the year
38 1924 and all subsequent years on the calendar year basis and at all times material to this case, upon the cash receipts and disbursements basis.

At all material times herein, the petitioner was President of United States Gypsum Company, an Illinois corporation, and was a stockholder therein.

On November 12, 1924, United States Gypsum Company declared dividends upon its preferred and common stock, payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924. The resolutions declaring said dividends are as follows:

"Resolved that an amount equal to one and three-quarters (1¾%) per cent, on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924."

39 Pursuant to said resolutions dividends aggregating $266,490.10 were paid to the petitioner, the checks therefor being actually received by him on January 2, 1925. These dividends were included in petitioner's income tax return for the calendar year 1925, the year in which the dividend checks were actually received by him, and were not included in petitioner's income tax return for the calendar year 1924.

On November 12, 1925, United States Gypsum Company declared dividends upon its preferred and common stock, payable on or before December 31, 1925, to stockholders of record at the close of business on December 5, 1925. The resolutions declaring said dividends were as follows:

"Resolved that an amount equal to 1¾% on the preferred stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the close of business on that date, on or before December 31, 1925:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1925;

"Resolved that an amount equal to $2.00 per share on the common stock outstanding at the close of business on December 5, 1925, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1925."

Pursuant to said last named resolutions, dividends aggregating $161,511.70 were paid to the petitioner, the checks therefor being actually received by him on January 2, 1926. These dividends were included in petitioners' income tax return for the calendar year 1926, the year in which the dividend checks were actually received by him, and were not included in petitioner's income tax return for the calendar year 1925.

Similarly in subsequent years United States Gypsum Company declared dividends upon its preferred and common stock, said dividends being payable on or before December 31st of the respective years in which said dividends were declared. Petitioner received dividends pursuant to such resolutions and returned the same in his income tax return for the respective years in which the dividend checks were actually received by him.

Treating in each case the dividends so received by the petitioner as income for the year in which such dividends were respectively declared and by said respective resolutions made payable, and not as income for the respective years in which

the dividend checks were actually received by the peti-
41 tioner, respondent increased petitioner's 1924 income by the amount of the said dividends of $266,490.10, decreased his 1925 income by the amount of said last mentioned dividends and increased his said 1925 income by the amount of the said dividends of $161,511.70. Corresponding changes were made in subsequent years, respondent as to each year insisting on including the respective dividends as income for the year immediately prior to the year in which said dividends were respectively reported by the petitioner.

For convenience the following table shows the years for which the said respective dividends were reported by the petitioner and the years for which respondent insisted that said respective dividends be reported:

Year	Returns as Made	Returns as Adjusted
1924	.....	$266,490.10
1925	$266,490.10	161,511.70
1926	161,511.70	140,117.30
1927	140,117.30	.....
1928	.....	32,656.00
1929	32,656.00	48,984.00
1930	48,984.00	.....

The foregoing adjustments resulted in the asserted deficiency of $101,269.27 for 1924, overassessments of $20,995.68 and $3,791.26 for 1925 and 1926, respectively, and an
42 asserted deficiency of $2,658.13 for 1929. The said last named deficiency has also been sustained by the Board of Tax Appeals in Docket No. 62,783, and its determination thereof is the subject-matter of a separate petition for review.

The petitioner's income tax returns for the years 1927 and 1928, involving the same issue as to whether dividends should be reported by the petitioner in the year in which actually received by him or in which by the resolutions declaring the same they were made payable, are pending before the Department undetermined.

During all of the times material to this case the established practice and custom of United States Gypsum Company in the preparation and sending out of its dividend checks was such as to preclude the receipt by any stockholder of his dividend check or checks until on or after the first business day

of the calendar month next succeeding the date on or before which, according to the resolutions, the respective dividends were payable. All dividends were payable quarterly and were made payable or on or before the 30th or 31st day of the last calendar month, depending upon the month, of the quarterly period. In the case of the dividends here involved and in the case of all dividends which were payable on or before December 31st of any year, the preparation and sending out of the dividend checks was such as to preclude any stockholder from receiving his dividend check or checks until January 2nd of the year next following. That the stockholders, including the petitioner, did not receive the dividend checks until the first business day of such succeeding calendar month was therefore due to the established practice and custom and action of the company and not in any way to any voluntary act on the part of the stockholders.

43 On December 5, 1924, the total outstanding common stock of the company was 325,397 shares (par value $20) and the total outstanding preferred stock was 84,649 shares (par value $100). At the close of business on the same day, the petitioner owned 48,604 shares of common stock and 2,302 shares of preferred stock. On December 5, 1925, the total outstanding common stock of the company was 440,723 shares and the total outstanding preferred stock was 82,772 shares. At the close of business on said last mentioned date, the petitioner owned 65,618 shares of common stock and 2,302 shares of preferred stock.

As heretofore stated, the Commissioner included the said dividends of $266,490.10 in petitioner's income for 1924 and excluded them from petitioner's income for 1925 in which petitioner had included them. He included said dividends of $161,511.70 in petitioner's income for 1925 and excluded them from petitioners' income for 1926 in which petitioner had included them. The Commissioner at the same time increased petitioner's income for 1926 by the amount of the dividends of $144,117.30 which petitioner had included in his income for 1927 because the dividend checks therefor were actually received by him on January 2, 1927.

The petitioner thereupon filed his petition with the United States Board of Tax Appeals, contending that the said

44 dividends of $266,490.10 constituted income for the year 1925 in which year the dividend checks were actually received by him and did not constitute income for the calendar

year 1924 as claimed by the Commissioner. But the Board of Tax Appeals by its opinion and order of February 2, 1933, sustained the claims of the Commissioner and held said dividends to be taxable income for 1924. The Board of Tax Appeals determined the deficiency accordingly.

III.

Assignm of err

Assignments of Error.

The petitioner assigns error as to the following acts and omissions of the Board of Tax Appeals:

(1) That the Board of Tax Appeals erred in holding that said dividends amounting to $266,490.10, the dividend checks for which were not actually received by the petitioner until January 2, 1925, constituted taxable income for the calendar year 1924.

(2) That the Board of Tax Appeals erred in not holding that said dividends of $266,490.10 constituted taxable net income for the calendar year 1925.

(3) That the Board of Tax Appeals erred in holding that said dividends of $266,490.10 were constructively re-
45 ceived by the petitioner in 1924.

(4) That the Board of Tax Appeals erred in determining a deficiency against the petitioner in said sum of $101,269.27, or in any sum whatsoever.

(5) That the Board of Tax Appeals erred in not entering judgment for the petitioner.

(6) That the Board of Tax Appeals erred in entering judgment for the respondent.

LELAND K. NEEVES,
Attorney for Sewell Lee Avery,
134 South La Salle Street,
Chicago, Illinois.

46 United States of America
State of Illinois
County of Cook } ss.

LELAND K. NEEVES being first duly sworn, deposes and says that he is counsel of record for the petitioner in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said

petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 22nd day of April, 1933.

(Notarial Seal) BLANCHE E. NOVAK.

My Commission expires May 15, 1933.

June 1933. 63 * * (Caption 40238) * *

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to July 31, 1933.

(Signed) LOGAN MORRIS,
Member.

Dated Washington, D. C.,
June 19, 1933.

ne 2, 61 * * * (Caption 40238) * *

PRAECIPE FOR RECORD.

Filed June 2, 1933.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:
(a) Petition for redetermination.
(b) Answer of the respondent.
62 (3) Memorandum opinion of the Board of Tax Appeals.
(4) The decision of the Board.
(5) The petition for review, filed by the petitioner in the above cause.
(6) The statement of evidence.
(7) This Praecipe.
(8) All orders for the enlargement of the time for the transmission and delivery of the above mentioned documents. Not included in Transcript.

LELAND K. NEEVES,
Attorney for Petitioner.

May 27th, 1933.

Personal service of a copy of the foregoing praecipe for record is hereby acknowledged this 2nd day of June, 1933.

(Sgd.) C. M. CHAREST,
General Counsel; Bureau of Internal Revenue, Counsel for Respondent.

64 (Caption 40238)

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 62, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 10th day of July, 1933.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(Seal)

Sewell L. Avery, *Petitioner,*		
v.	}	Docket No. 62783.
Commissioner of Internal Revenue, *Respondent.*		

Appearances:

For Taxpayer: Leland K. Neeves, Esq.

For Comm'r.: Chester A. Gwinn, Esq.

DOCKET ENTRIES.

1932

Mar. 14—Petition received and filed. Taxpayer notified. (Fee paid)

Mar. 14—Copy of petition served on General Counsel.

May 13—Answer filed by General Counsel.

May 25—Copy of answer served on taxpayer. General Calendar.

Jul. 12—Hearing set for week of September 6, 1932 at Chicago, Ill.

Sep. 19—Hearing had before Mr. Trammell, Div. 2. Called on merits. Stipulation of facts filed. Petitioner's brief due in 2 weeks—Commissioner's brief two weeks after petitioner's. Two weeks for petitioner's reply. Calendar call Sept. 6, 1932.

Oct. 3—Brief filed by taxpayer.

Oct. 11—Transcript of hearing of Sept. 19, 1932 filed.

Oct. 31—Motion for extension to Nov. 14, 1932 to file brief and to Nov. 30, 1932 to file reply filed by General Counsel. 11/1/32 granted.

Nov. 14—Brief filed by General Counsel.

Nov. 29—Reply brief filed by taxpayer. 12/2/32 copy served.

1933

Feb. 2—Memorandum opinion rendered, Charles M. Trammell, Div. 2. Judgment will be entered for the respondent.

Feb. 2—Decision entered, Charles M. Trammell, Div. 2.

Feb. 27—Motion for review by the entire Board filed by taxpayer.

Feb. 27—Order denying motion for review entered.

Mar. 6—Motion to fix amount of bond, filed by taxpayer.

Mar. 8—Order fixing amount of bond at $162,000. entered.

Apr. 18—Supersedeas bond in the amount of $162,000 approved and ordered filed.

Apr. 25—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Apr. 26—Proof of service filed by taxpayer.

May 26—Statement of evidence lodged.

May 29—Notice of motion to settle evidence June 7, 1933 filed by taxpayer.

Jun. 1—Notice of agreement with statement of evidence filed by General Counsel.

Jun. 2—Motion to settle statement of evidence filed by taxpayer.

Jun. 2—Praecipe of record with proof of service filed by taxpayer.

Jun. 3—Statement of evidence approved and ordered filed.

Jun. 19—Order enlarging time to July 31, 1933 for transmission and delivery of record entered.

2 UNITED STATES BOARD OF TAX APPEALS.

Sewell L. Avery,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 62783.

PETITION.

Filed March 14, 1932.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols AT:AR:D-1, ARS-60D) dated January 29, 1932, and as the basis of his proceeding alleges as follows:

1. Petitioner is an individual with address at 300 West Adams Street, Chicago, Illinois.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit 1, was mailed to the petitioner on January 29, 1932, as the petitioner believes.

3 3. The taxes in controversy are income taxes for the year 1929. The deficiency asserted is $2,658.13, the whole amount of which is in controversy.

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of the petitioner for the year 1929, the Commissioner erroneously included certain dividends, amounting to $48,984.00, declared and paid by the United States Gypsum Company, which dividends were received by the petitioner in 1930 and not in 1929, and in the same connection excluded certain dividends, amounting to $32,656.00, declared and paid by United States Gypsum Company, which dividends were in fact received by the petitioner in 1929.

The said dividends of $48,984.00 paid to the petitioner, were paid by said United States Gypsum Company pursuant to a resolution, copy of which is attached hereto and marked Exhibit 2.

(b) The Commissioner has erroneously increased the petitioner's taxable net income for the year 1929 by the amount of the difference between said dividends of $48,984.00 and said dividends of $32,656.00.

(c) The Commissioner has erroneously increased the petitioner's income tax payable with respect to the year 1929 by the said sum of $2,658.13 which said latter sum is the net increase in income tax resulting from the inclusion of said $48,984.00 of dividends in the petitioner's taxable income for 1929 and the exclusion of the said dividends of $32,656.00 therefrom.

5. The facts upon which the petitioner relies are as follows:

(a) Petitioner is an individual stockholder in United States Gypsum Company, an Illinois corporation, with its principal office in the City of Chicago, County of Cook and State of Illinois, of which corporation the petitioner at all times herein mentioned was a minority stockholder.

(b) The said United States Gypsum Company, by a resolution of its Board of Directors duly adopted on, to-wit, November 13, 1929, directed that a dividend be paid equal to two per cent (2%) on its common stock outstanding at the close of business on December 14, 1929, payable to the common stockholders of record at the close of business on said date, on or before December 31, 1929, all as is more particularly shown in the said resolution, copy of which is attached hereto and marked Exhibit 2, as has been hereinbefore stated. The said common stock is of the par value of Twenty Dollars ($20) per share.

(c) Petitioner at the close of business on said December 14, 1929, was the owner of 122,460 shares of the common stock of said United States Gypsum Company, and the dividends payable thereon under the aforesaid resolution amounted to the said sum of $48,984.00. Petitioner, by reason of his ownership of said shares of common stock, was paid the said sum of $48,984.00 as dividends thereon.

(d) The dividend checks of the said United States Gypsum Company in payment of the dividends declared as set forth in the said resolution, were mailed from the office of the said United States Gypsum Company to its various stockholders on December 31, 1929. The dividend checks for the amount of the dividends payable to the petitioner, pursuant to the said resolution, were actually received by petitioner in January, 1930 and no part of said dividends were received by the petitioner in 1929.

(e) The petitioner duly filed his income tax return for the year 1929 and included therein as part of his taxable net income for said year, the said dividends amounting to $32,656.00 received by the petitioner in January, 1929, on account of dividends declared by the said United States Gypsum Company in 1928, pursuant to a resolution duly adopted by the Board of Directors of said company on, to-wit, November 14, 1928, a copy of which is attached hereto and made a part hereof and marked Exhibit 3, but did not include therein the said dividends amounting to $48,984.00 so received by the petitioner in January, 1930. The dividend checks of the said United States Gypsum Company in payment of the said dividends so declared on November 14, 1928 were mailed from the office of the said United States Gypsum Company to its various stockholders on December 31, 1928. The dividend checks, aggregating the said sum of $32,656.00 and representing the dividends payable to the petitioner pursuant to said resolution, were actually received by the petitioner in January, 1929.

(f) The petitioner in his tax returns for the years prior to 1929, and for the years subsequent thereto, as well as for the year 1929, included as part of his taxable net income only the dividends from said United States Gypsum Company actually received by him in the year with respect to which his return was filed. The petitioner at all times herein mentioned, and especially with respect to the year 1929, kept his books and accounts upon a "cash receipts and disbursements" basis and not upon an "accrual" basis, and has filed his income tax returns upon the said basis of cash receipts and disbursements

and not upon an accrual basis, and has kept his books and accounts and filed his income tax returns for all of said years upon a calendar year basis.

(g) The petitioner relies upon the appropriate provisions of the Revenue Act of 1928 and upon the ground that
6 neither the said dividends amounting to $48,984.00, nor the checks of the said United States Gypsum Company in payment thereof, were received by the petitioner in 1929, but on the contrary were received by the petitioner in the calendar year 1930. And the petitioner further relies, but without limiting the same thereto, on the case of *Commissioner* v. *Adams*, decided by the United States Circuit Court of Appeals for the First Circuit, on December 17, 1931, reported in 54 Fed. (2d) 228.

Wherefore, the petitioner prays that the Board may hear this proceeding and determine that the alleged deficiency is not in fact due from the petitioner, that the petitioner be relieved from the deficiency so asserted against him by the respondent, that the correct tax for the year 1929 be determined to be as has heretofore been paid by the petitioner, and that the petitioner have such further relief as he may be by law entitled.

SEWELL L. AVERY,
Petitioner,
By LELAND K. NEEVES,
Counsel for Petitioner,
134 S. La Salle Street
Chicago, Illinois

Of Counsel
SCOTT, MACLEISH & FALK
134 South LaSalle Street
Chicago, Illinois

7 State of Illinois } ss.
County of Cook }

SEWELL L. AVERY being first duly sworn upon oath says that he is the petitioner above named, that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated therein are true.

SEWELL L. AVERY.

Subscribed and Sworn to before me this 11th day of March, A. D. 1932.

ASTRID O. LYNUM,
(Seal) *Notary Public.*

My Commission Expires Sept. 18, 1934.

8 EXHIBIT 1.

XP-2-28

IT:AR:D-1 Copy
AHB-60D
Mailed
Jan. 29, 1932

Mr. Sewell L. Avery,
300 West Adams Street,
Chicago, Illinois

Sir:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $2,658.13, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER
Deputy Commissioner

Enclosures:
Statement
Form 882
Form 870

JBW-1

9 **Statement**

IT:AR:D-1
AHS-60D

In re: Mr. Sewell L. Avery,
300 West Adams Street,
Chicago, Illinois.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$11,810.66	$9,152.53	$2,658.13

The report of the internal revenue agent in charge at Chicago, Illinois, covering an examination of your books of account and records for 1929 has been reviewed by this office together with your protest and a memorandum of a conference held in the revenue agent's office April 28, 1931, disclosing the above deficiency in tax outlined as follows:

Ordinary net income reported on return		$61,473.24
Capital net gain reported on return		10,585.00
Add:		
1. Additional interest income		23,969.04
2. Ordinary loss from sale of securities decreased		11,000.00
3. Additional dividends		12,768.96
4. Decrease in taxes paid		2.81
Total		$119,799.05
Deduct:		
5. Additional contributions	$ 7,098.87	
6. Decrease in capital gain	11,000.00	18,098.87
Total adjusted net income		$101,700.18
Computation of Tax		
Total net income adjusted		$101,700.18
Plus:		
Capital net loss included		415.00
Ordinary net income adjusted		$102,115.18
10 Less:		
Dividends	$303,672.08	
Personal exemption and credit for dependents	2,000.00	305,762.08
Net income subject to normal tax		None
Surtax on $102,115.18		$ 12,083.04

Less:		
Tax at 12 1/2% on $415.00		51.88
Total		$ 12,031.16
Less:		
Earned income credit	$220.00	
Tax paid at source	.50	220.50
Tax liability		$ 11,810.66
Tax originally assessed	$5,738.34	
Additional assessment	3,414.19	9,152.53
Deficiency in tax		$ 2,658.13

Explanation of Changes

1. Interest received from the United States Gypsum Company of $20,410.00 and from the Kreuger and Toll Company of $3,559.04 have been included as taxable income on your return.

2 and 6. Loss from sale of 200 shares of Chronicle of America Picture of $11,000.00 reported as an ordinary loss has been treated as a capital loss for the reason that this stock was held over two years.

3. Dividends declared in December 1929 of $48,984.00 less amount dividends of $32,656.00 declared in December 1928 has been included as taxable income on your return. An item of interest reported as dividends from the Kreuger and Toll Company of $3,559.04 has been transferred to item one above.

You are advised that consideration has been given your protest against the inclusion of dividends declared in December 1929 by the United States Gypsum Company and the exclusion of dividends declared by this company in December 1928. Since the question is pending before the United States Board of Tax Appeals for prior years your contention is denied.

11 4. Proper deduction for taxes paid on personal property at Grand Island has been determined to be $113.37 instead of $116.18 claimed on your return.

5. Contributions have been increased to 15% of your adjusted net income.

A copy of this communication has been transmitted to your representative, Mr. L. K. Neeves, 134 South LaSalle Street, Chicago, Illinois, who has a power of attorney on file in this office.

JBW-1

12 EXHIBIT 2.

Resolved: That an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929.

It Is Also Resolved: That for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929, to December 31, 1929, inclusive.

13 EXHIBIT 3.

Feb 2,

Resolved: That an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend, and that this amount be paid to be common stockholders of record at the close of business on that date, on or before December 31, 1928.

It Is Also Resolved: That for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 15, 1928, to December 31, 1928.

14 * * (Caption 62783) * *

ANSWER.

Filed May 13, 1932.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations of paragraph 1.

2. Admits that notice of deficiency was mailed to petitioner on January 29, 1932.

3. Admits the allegations of paragraph 3.

4. Denies that the Commissioner committed the errors alleged in subparagraphs (a), (b), and (c) of paragraph 4.

5. Denies the allegations of paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

11d
5/12/32

40-53 * * (STATEMENT OF EVIDENCE. Omitted per order of July 24, 1933. See index.) * *

15 * * (Caption 40238 and 62783) * *

Leland K. Neeves, Esq., for the petitioner.

Chester A. Gwynn, Esq., for the respondent.

MEMORANDUM OPINION.

Trammell: In the petitions filed in these proceedings, which were consolidated for hearing, the petitioner alleges error on the part of the respondent in determining deficiencies and overassessments as follows:

Docket No.	Year	Deficiency	Overassessment
40238	1924	$101,269.87	
	1925		$ 20,995.68
	1926		3,791.26
62783	1929	2,658.13	

Inasmuch as the respondent has not determined deficiencies in tax for 1925 and 1926 we do not have jurisdiction
16 with respect to such years. The proceeding in Docket No. 40238 will be dismissed in so far as it relates to a

determination of the petitioner's tax liability for those years. *Cornelius Cotton Mills*, 4 B. T. A. 255.

The only matter presented for determination with respect to the years 1924 and 1929 is the correctness of the respondent's action in including in the petitioner's taxable income for such years certain dividends on corporate stock owned by the petitioner which were declared in such years, which were payable on December 31 of such years and checks for which were not actually received by petitioner until January 2 of the years following. In addition to certain testimony the proceedings were submitted on a stipulation of facts, pertinent portions of which are as follows:

> The petitioner in the above causes is an individual and at all material times herein is and was a citizen of the United States and a resident of the City of Evanston, County of Cook and State of Illinois.
>
> Petitioner is and at all material times herein was, a stockholder of the United States Gypsum Company, an Illinois corporation with its principal office at No. 300 West Adams Street, Chicago, Illinois, formerly No. 205 West Monroe Street, Chicago, Illinois, owning a minority number of the preferred and common shares of the capital stock of said corporation. Petitioner is and at all of said times was President of said corporation.
>
> Petitioner has always kept his accounts and has reported his income upon a cash receipts and disbursements basis and upon a calendar year basis.
>
> The Commissioner has determined a deficiency for the year 1924 of $101,269.27, * * * and a deficiency for the year 1929 of $2,658.13.
>
> In determining the said deficiency of $101,269.27 for the year 1924, the Commissioner increased the taxable income reported by the petitioner for said year by the amount of $266,490.10, representing certain dividends received by the petitioner as a stockholder of said United States Gypsum Company.
>
> 17 The said dividends of $266,490.10 were paid pursuant to a resolution of said corporation duly adopted on November 12, 1924, reading as follows:
>
> "Resolved that an amount equal to one and three-quarters (1-3/4%) per cent. on the preferred stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid to the preferred stockholders of record at the

close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an amount equal to two (2%) per cent. on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1924;

"Be It Further Resolved that an additional amount equal to Five ($5.00) Dollars per share on the common stock outstanding at the close of business on December 5, 1924, be transferred to the dividend account and that this amount be paid as an extra dividend to the common stockholders of record at the close of business on that date, on or before December 31, 1924.

The said dividends of $266,490.10 were reported by the petitioner in his income tax return for the calendar year 1925.

* * * * * *

On November 14, 1928, the said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

"It Is Also Resolved that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Petitioner received dividends amounting to $32,656.00 from said corporation under the last mentioned resolution.

18 On November 13, 1929, said United States Gypsum Company duly adopted the following resolution:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"It Is Also Resolved that for the purpose of the foregoing, the stock books be closed for the transfer of com-

mon stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Petitioner received dividends amounting to $48,984.00 from said corporation pursuant to said last mentioned resolution.

In determining the deficiency for the said year 1929, amounting to $2,658.13, the Commissioner increased the petitioner's taxable income by the amount of said dividends of $48,984.00 and decreased the petitioner's taxable income by the amount of said dividends of $32,656. Petitioner included the said dividends of $48,984.00 in his return for the year 1930 and had included the said dividends of $32,656.00 in his return for the year 1929.

The said dividends of $266,490.10 received by the petitioner pursuant to the resolution adopted on November 12, 1924, were paid to the petitioner by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1925, on, to-wit, January 2, 1925. * * * The said dividends of $32,656.00 received by the petitioner pursuant to said resolution of November 14, 1928 were paid by the check or checks of said corporation, which checks were actually received by the petitioner in January, 1929, on, to-wit, January 2, 1929. The said dividends of $48,984.00 received by the petitioner pursuant to the resolution of November 13, 1929 were paid by the check or checks of said United States Gypsum Company, which checks were actually received by the petitioner in January, 1930, on, to-wit, January 2, 1930.

The practice followed by the United States Gypsum Company in the distribution of its dividend checks for the years 1924 through 1929 was as follows: The treasurer's department which has supervision of the matter received from the secretary a complete list of the stockholders, showing the number of shares and the addresses of the stockholders and the amounts to which they were entitled. Upon receipt of the list, the treasurer's department turned over to the addressograph department blank checks upon which were printed the names of the stockholders respectively and their addresses. The checks were then returned to the treasurer's department. The checks were then signed with the amount of the check still in blank and the check numbers were imprinted upon the stockholders' list. The amount of each check was then filled in and the checks were totalled and balanced with the dividend list. They were then separated,

the checks up to that time being in sheets of five, were dated and inserted in their envelopes.

The checks were turned over to the mailing department in the afternoon anywhere from one to three o'clock. The mailing department sealed the envelopes, stamped the permit number on the envelopes for mailing, and took the envelopes to the post office. The checks never left the mailing department before six o'clock. In many instances it was necessary for the mailing department to work until six or seven o'clock and then take the checks to the post office. Usually the envelopes containing the checks were taken to the post office by a trucking company that took the company's mail to the post office and upon some occasions when the mailing department had worked overtime, the checks were taken to the post office in a taxi cab.

20 The stockholders' or dividend list was usually received from the secretarial department by the treasurer's department anywhere from the 20th to the 22nd of the month. The work of the treasurer's department started when the list was received from the secretarial department. The dividend checks never left the treasurer's office or were sent to the mailing department until the afternoon of the last day of the month, and the checks were mailed on the last day of the month so as to be in the stockholders' hands on the first business day of the following month.

Dividends were payable quarterly and in every instance they were made payable on or before the last day of the month, the 30th or 31st, depending upon the month.

In the case of certain of the stockholders who were employees of the company, at the Chicago general office, including the petitioner, approximately fifty in number, the dividend checks were not mailed but were held in the treasurer's office until the first business day of the following month and were then distributed to the employees through the office mail. The petitioner's dividend checks were always delivered to his secretary on the first business day of the following month. The practice was without exception that no stockholder, whether employee or officer, receive his check before the first business day of the month following the month in which the dividends were made payable.

21 The number of shares of stock of the United States Gypsum Company outstanding and the number of shares owned by the petitioner were as follows on the dates indicated:

Date	Common Stock Shares Outstanding	Common Stock Shares Owned by Petitioner	Preferred Stock Shares Outstanding	Preferred Stock Shares Owned by Petitioner
Dec. 5, 1924	325,397	48,604	84,649	2,302
Dec. 5, 1925	440,723	65,618	82,772	2,302
Dec. 15, 1928	760,436	81,640	77,281	2,306
Dec. 14, 1929	1,149,315	122,406	75,417	2,306

The petitioner contends that under the circumstances here presented the respondent erred (1) in including in taxable income for 1924 the dividends of $266,490.10 declared by the corporation on November 12, 1924 payable on or before December 31, 1924 to stockholders of record at the close of business on December 5, 1924 and the check or checks for which were not actually received by the petitioner until on January 2, 1925 and (2) in including in taxable income for 1929 the dividends of $48,984 declared by the corporation on November 13, 1929 payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929 and the check or checks for which were not received by the petitioner until on January 2, 1930. The respondent contends that his action was correct and should be sustained.

The petitioner contends that under the Revenue Acts of 1924, 1926 and 1928 the time of the actual receipt of dividends determines the year in which they are to be subject to
22 tax and that since the checks for the dividends in controversy were actually received by him in the years following those in which the respondent seeks to tax them the respondent's action should be reversed.

The pertinent provisions of the Revenue Act of 1924 are as follows:

> SEC. 213. For the purposes of this title * * *
>
> (a) The term "gross income" includes * * * income derived from * * * dividends * * * The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.
>
> SEC. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer;

In so far as here material the pertinent portions of the Revenue Acts of 1926 (Secs. 212 and 213) and 1928 (Sections 22, 41 and 42) are substantially the same as the foregoing provisions of the Revenue Act of 1924.

Respecting the time when dividends are to be included in gross income neither the Revenue Act of 1924 nor the subsequent Acts contain the same or a similar provision to that contained in section 201 (e) of the Revenue Act of 1921 to the effect that "a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands." The petitioner pointing to the omission in the later acts of the provision contained in section 201 (e) of the Act of 1921 and relying on the statements of the court in *Commissioner* v. *Cecil Q. Adams*, 54 Fed. (2d) 228, Circuit 23 Court of Appeals, First Circuit, in affirming 20 B. T. A. 243 urges that we reconsider the decisions which we have rendered since our decision in the *Adams* case and which involved the time for including in income under the 1924 and later Acts dividends received under circumstances similar to those here presented.

In *Cecil Q. Adams, supra*, there was involved the question of the inclusion in the taxpayer's gross income for the calendar year 1924 the amount of a dividend which was declared on December 26, 1924 by a resolution which stated "Checks for same to be mailed December 31, 1924" where the taxpayer, who kept his books and reported his income for each calendar year on the basis of cash received and disbursed, received a check for his dividend in due course on January 2, 1925. We there considered the legislative history relating to the omission from the Act of 1924 of the above quoted provision contained in section 203 (e) of the Revenue Act of 1921 and said:

> Clearly, Congress intended that even under the 1924 Act there might be a constructive receipt of dividends which would make such dividends taxable to the stockholder prior to the date upon which he actually received them. In this Act, Congress apparently abandoned a specific provision that all items of gross income would be taxable in the year in which unqualifiedly made subject to the demands of the taxpayer, because it considered that such would be the rule followed even in the absence of a statutory provision. In other words, Con-

gress beieved that there were some cases in which the courts would and should hold that income was constructively received under well established rules of law and no enlargement of these rules was necessary. Each case in which the Commissioner attempts to apply the rule of constructive receipt will depend upon its own facts as to whether or not there is justification for the application of such a rule. But, in general, income should not be construed to have been received prior to the date of actual receipt except where a taxpayer turns his back upon income or does not choose to receive income which he could have if he chose. Cf. *John A. Brander, supra; Robert W. Bingham,* 8 B. T. A. 603.

24 Inasmuch as the resolution declaring the dividend expressly provided that checks should be mailed on December 31, 1924, as the language was purposely inserted in such resolution and as there was no other time of payment fixed and no other method of payment authorized we concluded that the dividend was not unqualifiedly subject to the demand of the taxpayer in 1924 and therefore was not to be included in the petitioner's taxable income for 1924.

In affirming our decision the Circuit Court of Appeals said:

> The Board of Tax Appeals in its opinion distinguished the present case from that of *Commissioner* v. *Bingham,* 35 Fed. (2d) 503, 281 U. S. 729, 50 S. Ct. 246, on the ground that the latter arose under the Revenue Act of 1921 (42 Stat. c. 136), which contained a provision in Sec. 201 (e) that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands"; and on the further ground that the resolution, above referred to, fixed the time of payment as of December 31, 1924, and the method of payment to be by check, mailed on that day; and fixed no other time of payment and authorized no other method.
>
> The case of *Commissioner* v. *Bingham, supra,* is clearly distinguishable from the present one, for the reason that the tax there in question was governed by the Revenue Act of 1921, in which Sec. 201 (e) expressly provides that dividends "shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands," which provision the Act of 1924 does not contain.

The Act of 1924 not only does not contain the above provision, but in Section 213 (a) expressly provides that dividends "shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of Section 212," with which exception we are not concerned.

The applicable provisions of Section 213 (a) are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the Act is unambiguous and its meaning plain, is to be gathered from the Act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this Act speaks for itself; it does not call for construction. And on this ground alone, we think that the Board of Tax Appeals did not err in reaching the conclusion that it did.

We are also of the opinion that, on the facts found, the dividends were not "unqualifiedly made subject to the demand of the stockholder," in the year 1924, if Art. 52 of the Departmental Regulations can be said to be valid and not in conflict with the express language of Sec. 213 (a).

The petitioner contends that under the language used by the court there is no authority in the Revenue Acts of 1924, 1926 and 1928 for including in taxable income dividends received under the circumstances here involved.

Subsequent to our decisions in the *Adams* case and prior to the affirmance thereof by the Circuit Court of Appeals we decided *Mary Miller Brarton*, 22 B. T. A. 128 which arose under the Revenue Act of 1926. The *Brarton* case involved the inclusion in income for 1927 by a taxpayer on the cash receipts and disbursements and calendar year basis of dividends declared in that year, the checks in payment of which were dated and mailed December 31, 1927 but not actually received by the taxpayer until January 2, 1928. After again reviewing the legislative history relating to the omission from the later Revenue Acts of the provisions contained in section 203 (c) of the Revenue Act of 1921 we said:

From these reports and the various stages of the bill, it is clear that the legislative intent was that gross income should continue to include the items covered by section 201 (c) of the 1921 Act, and that the general language of the statute was sufficient to express this intent.

> We think the language of the 1924 and 1926 Acts is entirely susceptible of this construction, or, to put it contrariwise, we think that the language used does not clearly exclude such items from gross income, and hence that the actual intention may properly be effectuated by the application of the general language to dividends, when subject to demand. These dividends were payable in 1927, and, as held generally in the *Bingham* case, *supra*, were, therefore, in the absence of evidence to the contrary, receivable by the stockholder on mere demand and hence constructively received.

In distinguishing our decision in that case from that in the *Adams* case we said:

> *Cecil Q. Adams*, 20 B. T. A. 243, contained an important difference—the dividend was only payable by a check to be mailed December 31, and hence the stockholder had no right to demand payment otherwise before receipt by mail.

Subsequent to the decision of the Circuit Court of Appeals in the *Adams* case we decided the case of *Effie B. Shearman*, 26 B. T. A. 716 which arose under the Revenue Act of 1928. There dividends were declared in 1928 payable on December 31, 1928 to stockholders of record "at the close of business on that day." Checks dated December 31, 1928 were mailed on that date to and were received on January 2, 1929 by the taxpayer who reported her income on the cash receipts and disbursements basis. Following our decision in the *Braxton* case we held the dividends to be taxable in 1928.

Franklin J. Matchette, 26 B. T. A. 909 involved the question of the taxability in 1924 of dividends declared December 20, 1924, payable December 31, 1924 to stockholders of record on December 15, 1924 the check in payment of which was mailed on December 31, 1924, and received between January 2, and January 7, 1925 by the taxpayer who filed his returns on
27 a cash receipts and disbursements basis. Following our decisions in the *Braxton* and *Shearman* cases we held the dividends to be taxable in 1924.

While we recognize that our holdings in the *Braxton*, *Shearman* and *Matchette* cases are not in harmony with some of the language used by the court in the *Adams* case we are, however, of the opinion that our view expressed in the *Braxton* case and followed in the later cases, "that the legislative intent was that gross income should continue to include the items covered by section 201 (e) of the 1921 Act" is sound

and should continue to be followed. With due deference to the view expressed by the Circuit Court of Appeals for the First Circuit in the *Adams* case we must say that our decisions are reviewable by all of the Circuit Courts of Appeal and until others speak on this question we do not feel that we should abandon the view which we have heretofore adopted and followed.

The facts in the instant proceedings are almost identical with those in the *Braxton, Shearman* and *Matchette* cases. In those cases checks for the dividends were mailed to the taxpayers. In these proceedings they were not mailed on December 31 of the respective years to the taxpayer, who according to the pleadings and stipulated facts had the same business address as the corporation, but were delivered to him the following business day through the "office mail." This difference is not material, for as was said in the *Matchette* case the voluntary mailing of a dividend check by a corporation has no spe-
28 cial legal significance. The dividends in controversy were declared in 1924 and 1929 respectively and were payable on December 31 of such years. On the dates the dividends were payable the petitioner had a legal right to demand and receive payment thereof in cash. The fact that he did not choose to exercise such right but waited for the delivery of checks to him in the following years did not in any wise destroy such right. *Commissioner v. Bingham*, 35 Fed. (2d) 503. On the facts before us we are of the opinion that the dividends were receivable by the petitioner on the dates payable. Being thus receivable on such dates they were constructively received by the petitioner during the taxable years in controversy and therefore were subject to tax in such years. We perceive no error in the respondent's action and accordingly it is sustained.

JUDGMENT WILL BE ENTERED FOR THE RESPONDENT.

Enter:

Entered Feb 2 1933

29 * * (Caption 62783) * * Entered Fe 1933.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered February 2, 1933, it is

Ordered and Decided: That there is a deficiency of $2,658.13 for the year 1929,

Enter:

(S[illegible]ed) CHARLES M. TRAMMELL
Member.

(Seal)

Entered Feb 2 1933

30 * * (Caption 62783) * * Filed Apr. 1933.

PETITION FOR REVIEW OF BOARD DECISION.

Filed April 25, 1933.

Petition of Sewell L. Avery for Review by the United States Court of Appeals for the Seventh Circuit of a Decision by the United States Board of Tax Appeals.

Sewell L. Avery, the petitioner in this cause, by Leland K. Neeves, counsel, hereby files his petition for a review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision by the United States Board of Tax Appeals rendered on February 2, 1933 in the above cause, determining a deficiency in the petitioner's federal income taxes for the calendar year 1929 in the amount of $2,658.13, and respectfully shows:

31 I.

The petitioner is an individual and resides in the City of Evanston, County of Cook and State of Illinois, with his business address at No. 300 West Adams Street, Chicago, Illinois.

The petitioner being aggrieved by the said decision and final determination of the Board of Tax Appeals in the above entitled cause desires a review thereof in accordance with the provisions of the Revenue Act of 1926 as amended and/or

other applicable statutes by the United States Circuit Court of Appeals for the Seventh Circuit whereof the petitioner is an inhabitant.

II.

Nature of the Controversy.

The petitioner reported his income to the Commissioner of Internal Revenue for federal income tax for the year 1929 upon the calendar year basis. At all times material to this case, petitioner has reported his income upon such calendar year basis and upon the cash receipts and disbursements basis.

At all material times herein, the petitioner was President of United States Gypsum Company, an Illinois corporation, and was a stockholder therein.

32 On November 14, 1928, United States Gypsum Company declared a dividend upon its common stock, payable on or before December 31, 1928 to stockholders of record at the close of business on December 15, 1928. The resolution declaring said dividend was as follows:

"Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 15, 1928, be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1928;

"It Is Also Resolved that for the purpose of the foregoing the stock books be closed for the transfer of common stock from the close of business on December 15, 1928 to December 31, 1928."

Pursuant to said resolution a dividend amounting to $32,656.00 was paid to the petitioner, the check therefor being actually received by him on January 2, 1929. This dividend was included in petitioner's income tax return for the calendar year 1929, the year in which the dividend check was actually received by him and was not included in petitioner's income tax return for the calendar year 1928.

On November 13, 1929, United States Gypsum Company declared a dividend upon its common stock, payable on or before December 31, 1929 to stockholders of record at the close of business on December 14, 1929. The resolution declaring said dividend was as follows:

33 "Resolved that an amount equal to 2% on the common stock outstanding at the close of business on December 14, 1929 be transferred to the dividend account as a regular cash dividend and that this amount be paid to the common stockholders of record at the close of business on that date, on or before December 31, 1929;

"It Is Also Resolved that for the purpose of the foregoing, the stock books be closed for the transfer of common stock from the close of business on December 14, 1929 to December 31, 1929, inclusive."

Pursuant to said last named resolution, a dividend of $48,984.00 was paid to the petitioner, the check therefor being actually received by him on January 2, 1930. This dividend was included in petitioner's income tax return for the calendar year 1930, the year in which the dividend check was actually received by him and was not included in petitioner's income tax return for the calendar year 1929.

Similarly in prior years United States Gypsum Company had declared dividends upon its preferred and common stock, said dividends being payable on or before December 31st of the respective years in which said dividends were declared. Petitioner received dividends pursuant to such resolutions and returned the same in his income tax return for the respective years in which the dividend checks were actually received by him. The same issue involved in the above entitled cause is also involved in Docket No. 40238 involving
34 the years 1924, 1925 and 1926, the determination of the Board of Tax Appeals in said Docket No. 40238 being the subject-matter of a separate petition for review.

Treating in each case, including the calendar year 1929, the dividends so received by the petitioner as income for the year in which such dividends were respectively declared and by said respective resolutions made payable, and not as income for the respective years in which the dividend checks were actually received by the petitioner, respondent increased petitioner's 1929 income by the amount of said dividends of $48,984 and decreased said income by the amount of the said dividend of $32,656. Corresponding charges were made in prior and subsequent years, respondent as to each year insisting on including the respective dividends as income for the year immediately prior to the year in which said dividends were respectively reported by the petitioner.

For convenience the following table shows the years for which the said respective dividends were reported by the peti-

tioner and the years for which respondent insisted that said respective dividends be reported:

Year	Returns as Made	Returns as Adjusted
1924	.....	$266,490.10
1925	$266,490.10	161,511.70
1926	161,511.70	140,117.30
1927	140,117.30	.....
1928	.....	32,656.00
1929	32,656.00	48,984.00
1930	48,984.00	.....

35 The foregoing adjustment as to the year 1929 resulted in the asserted deficiency of $2,658.13 and as to the year 1924, an asserted deficiency of $101,269.27, and overassessments of $20,995.68 and $3,791.26 for 1925 and 1926 respectively. The said deficiency for 1924 has also been sustained by the Board of Tax Appeals in said Docket No. 40238.

During all of the times material to this case the established practice and custom of United States Gypsum Company in the preparation and sending out of its dividend checks was such as to preclude the receipt by any stockholder of his dividend check or checks until on or after the first business day of the calendar month next succeeding the date on or before which, according to the resolutions, the respective dividends were payable. All dividends were payable quarterly and were made payable on or before the 30th or 31st day of the last calendar month, depending upon the month, of the quarterly period. In the case of the dividends here involved and in the case of all dividends which were payable on or before December 31st of any year, the preparation and sending out of the dividend checks was such as to preclude any stockholder from receiving his dividend check or checks until January 2nd of the year next following. That the stockholders, including the petitioner, did not receive the dividend checks until the first business day of such succeeding calendar month was therefore due to the established practice and custom and
36 action of the company and not in any way to any voluntary act on the part of the stockholders.

On December 15, 1928, the total outstanding common stock of the company was 760,436 shares (par value $20) and the total outstanding preferred stock was 77,281 shares (par value $100). At the close of business on the same day the

petitioner owned 81,640 shares of the common stock and 2,306 shares of preferred stock. On December 14, 1929, the total outstanding common stock of the company was 1,149,315 and the total outstanding preferred stock was 75,417 shares. At the close of business on said last mentioned date, the petitioner owned 122,460 shares of common stock and 2,306 shares of preferred stock.

As heretofore shown, the Commissioner included the said dividends of $48,984.00 in, and excluded the said dividends of $32,656.00 from, petitioner's income for 1929, treating the former dividends as 1929 income and the latter dividends as 1928 income.

The petitioner thereupon filed his petition with the United States Board of Tax Appeals, contending that the said dividends of $48,984.00 constituted income for the year 1930 in which the dividends were actually received by him and did not constitute income for the calendar year 1929, as
37 claimed by the Commissioner, and that the proper amount of dividends returnable as 1929 income was the said amount of $32,656.00. But the Board of Tax Appeals by its opinion and order of February 2, 1933, sustained the claims of the Commissioner and held the said dividends of $48,984 to be taxable income for 1929. This meant a net increase in the dividends for 1929 of $16,328.00. The Board of Tax Appeals thereupon determined a deficiency against petitioner as claimed by the Commissioner, to-wit, $2,658.13.

III.

Assignment of Error.

The petitioner assigns error as to the following acts and omissions of the Board of Tax Appeals:

(1) That the Board of Tax Appeals erred in holding that the said dividends amounting to $48,984, the dividend checks for which were not actually received by the petitioner until January 2, 1930, constituted taxable income for the calendar year 1929.

(2) That the Board of Tax Appeals erred in not holding that the said dividends of $48,984 constituted taxable net income for the calendar year 1930.

(3) That the Board of Tax Appeals erred in holding
38 that the said dividends of $48,984 were constructively received by the petitioner in 1929.

(4) That the Board of Tax Appeals erred in not holding that the said dividends of $32,656 constituted taxable income for the calendar year 1929 and not for the calendar year 1928.

(5) That the Board of Tax Appeals erred in determining a deficiency against the petitioner in said sum of $2,658.13, or in any sum whatsoever.

(6) That the Board of Tax Appeals erred in not entering judgment for the petitioner.

(7) That the Board of Tax Appeals erred in entering judgment for the respondent.

LELAND K. NEEVES,
Attorney for Sewell L. Avery,
134 South LaSalle Street,
Chicago, Illinois.

39 United States of America,
State of Illinois,
County of Cook. } ss.

Leland K. Neeves being first duly sworn, deposes and says that he is counsel of record for the petitioner in the above named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

LELAND K. NEEVES.

Subscribed and sworn to before me this 22nd day of April, 1933.

BLANCHE E. NOVAK,
(Notarial Seal) *Notary Public.*

My Commission expires May 15, 1933.

54 * * * (Caption) * * *

PRAECIPE FOR RECORD.

Filed June 2, 1933.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

55 (3) Memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) The statement of evidence.

(7) This Praecipe.

(8) All orders for the enlargement of the time for the transmission and delivery of the above mentioned documents. Not included in Transcript.

LELAND K. NEEVES,
Attorney for Petitioner.

May 27th, 1933.

Personal service of a copy of the foregoing praecipe for record is hereby acknowledge this 2nd day of June, 1933.

(Sgd) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

56 * * (Caption) * *

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding by the United Ctates Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to July 31, 1933.

(Signed) LOGAN MORRIS,
Member.

Dated Washington, D. C.,
June 19, 1933.

57 * * (Caption) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 55, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 11th day of July, 1933.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery,
Petitioner,
vs.
Commissioner of Internal Revenue. } No. 5029.

Sewell L. Avery,
Petitioner.
vs.
Commissioner of Internal Revenue. } No. 5030.

ORDER.

Upon motion of Sewell Lee (L.) Avery, petitioner in the above two causes, by Leland K. Neeves, his attorney,

It Is Hereby Ordered that said causes be consolidated for hearing and for briefs and that a consolidated transcript of record be prepared and printed and the statement of evidence, being the same in each case, shall be printed in No. 5029 and incorporated by reference in No. 5030.

Entered this 24th day of July, 1933.

SAMUEL ALSCHULER,
Judge, United States Circuit Court of Appeals.

Endorsed: In the United States Circuit Court for the Seventh Circuit. Sewell Lee Avery, Petitioner, vs. Commissioner of Internal Revenue, No. 5029; Sewell L. Avery, Petitioner, vs. Commissioner of Internal Revenue, No. 5030. Order consolidating causes for hearing and briefs and for a consolidated transcript. Filed July 24, 1933. Frederick G. Campbell, Clerk. Scott, MacLeish & Falk, Attorneys at Law, 134 South La Salle Street, Randolph 9000, Chicago.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 71, inclusive, contain a true copy of the printed record printed under my supervision and filed on the fourth day of August, 1933, on which the following entitled causes were heard and determined:

Sewell Lee Avery

No. 5029 *vs.*

Commissioner of Internal Revenue

Sewell L. Avery

No. 5030 *vs.*

Commissioner of Internal Revenue

October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, A. D. 1933.

FREDERICK G. CAMPBELL,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the fourth day of October, 1932, of the October Term, in the year of our Lord Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-seventh.

5029 Sewell Lee Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals.

And afterwards, to-wit: On the eighteenth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of Counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

The Clerk will enter my appearance as counsel for Petitioner.

LELAND K. NEEVES,
134 So. La Salle St.,
Chicago, Illinois.

Endorsed: Filed July 18, 1933. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

The clerk will enter my appearance as counsel for Respondent.

PAT MALLOY,
SEWALL KEY,
Washington, D. C.

Endorsed: Filed July 24, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Affidavit of Service, Notice, Motion for Consolidation and for a Consolidated Transcript, and Affidavit in Support of Motion, which said Affidavit, Notice, Motion and Affidavit are in the words and figures following, to-wit:

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

AFFIDAVIT.

State of Illinois, County of Cook. } ss.

LELAND K. NEEVES being first duly sworn on oath deposes and says that on Wednesday, the 19th day of July, 1933, he caused to be mailed to the Attorney General at Washington, D. C., a certain Notice, together with copies of the motion, affidavit in support thereof, and proposed order referred to therein (copies of which are attached hereto), the same being deposited in the United States mail, postage prepaid, addressed to said Attorney General, Washington, D. C.

Further affiant saith not.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 19th day of July, 1933.

MILDRED C. SANDLEY,
Notary Public.

(Seal)

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

NOTICE.

To: The Attorney General,
Washington, D. C.,
Attorney for Respondent.

You Are Hereby Notified that on Monday next, July 24, 1933, at 10 o'clock in the forenoon, Chicago Daylight Saving Time, or as soon thereafter as counsel can be heard, before the Honorable Samuel Alschuler, presiding Judge of the United States Circuit Court of Appeals for the Seventh Circuit, in chambers, or in his absence before some one of the other Judges of said United States Circuit Court of Appeals for the Seventh Circuit, in the Federal Building, Chicago, Illinois, we shall move for a consolidation of the above causes for hearing and for briefs and for a consolidated transcript in accordance with the Motion, copy of which is handed you herewith. Said Motion is supported by the Affidavit of the undersigned, copy of which, together with a copy of the proposed Order, is handed you herewith.

LELAND K. NEEVES,
Attorney for Petitioner.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

MOTION FOR CONSOLIDATION AND FOR A CONSOLIDATED TRANSCRIPT.

Now comes Sewell Lee (L.) Avery, petitioner in the above two causes, by Leland K. Neeves, his attorney, and moves that said causes be consolidated for hearing and for briefs and that a consolidated transcript of the record be prepared and printed and that the statement of evidence, being the same in each case, shall be printed in No. 5029 and incorporated by reference in No. 5030.

LELAND K. NEEVES,
Attorney for the above named Petitioner.

United States of America } ss.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sewell Lee Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5029.

Sewell L. Avery, *Petitioner,*
vs.
Commissioner of Internal Revenue } No. 5030.

AFFIDAVIT.

State of Illinois, } ss.
County of Cook. }

LELAND K. NEEVES, being first duly sworn upon oath deposes and says that he is the attorney for the petitioner in the above two causes; that he is familiar with the proceedings had in said causes before the United States Board of Tax Appeals; that said causes before said United States Board of Tax Appeals, being No. 40238 and No. 62783, respectively, involve the same general question as to whether certain dividends declared and by the resolutions declaring the same made payable in one year but not actually received by the petitioner until the following year, should be returned by petitioner as part of his taxable net income for the year in which said dividends were declared or for the year in which said dividends were received; that said two causes were consolidated for hearing before the said United States Board of Tax Appeals, and that although a separate statement of evidence was filed in each of said two causes for purposes of review, the evidence is the same in each case.

Affiant further states that it will be for the convenience of the court and the parties concerned to have said two causes consolidated for hearing and for the filing of briefs and to

have a consolidated transcript prepared and printed with the statement of evidence printed only in No. 5029 and incorporated by reference in No. 5030.

Further affiant saith not.

LELAND K. NEEVES.

Subscribed and Sworn to before me this 19th day of July, A. D. 1933.

MILDRED C. SANDLEY,
Notary Public.

(Seal)

Endorsed: Filed July 24, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Monday, July 24, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.

5029	Sewell Lee Avery vs. Commissioner of Internal Revenue	Petition for Reviews of Orders of the United States Board of Tax Appeals.
5030	Sewell L. Avery vs. Commissioner of Internal Revenue	

On motion of Sewell Lee (L.) Avery, petitioner in the above two causes, by Leland K. Neeves, his attorney,

It is hereby ordered that said causes be consolidated for hearing and for briefs and that a consolidated transcript of record be prepared and printed and the statement of evidence, being the same in each case, shall be printed in No. 5029, and incorporated by reference in No. 5030.

And afterwards, to-wit: On the twenty-fifth day of July, 1933, there was filed in the Office of the Clerk of this Court a Motion for Substitution of party respondent, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the 7th Circuit.

No. 5029.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

MOTION FOR SUBSTITUTION.

Comes now the above named petitioner and moves the court that Guy T. Helvering, Commissioner of Internal Revenue, be substituted for David Burnet as respondent herein, and in support of said motion respectfully shows:

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review in this proceeding was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeding and obtaining an adjudication of the questions involved, for otherwise the order of the United States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of Section

11 of the Act of February 13, 1925, c. 229, 43 Stat. 941 (U. S. C., Title 28, Sec. 780).

Dated June 7, 1933.

LELAND K. NEEVES,
Attorney for Petitioner.

The undersigned, attorney for Guy T. Helvering, Commissioner of Internal Revenue, hereby expressly consents to the substitution sought by the above motion.

SEWALL KEY,
Special Assistant to the Attorney General, Attorney for Guy T. Helvering, Commissioner of Internal Revenue.

Endorsed: Filed July 25, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fifth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, July 25, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

5029	Sewell Lee Avery *vs.* Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

Upon motion of the petitioner, expressly consented to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby ordered that said Guy T. Helvering, as such officer, be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

And afterwards, to-wit: On the eleventh day of August, 1933, there was filed in the Office of the Clerk of this Court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

The Clerk will enter our appearance as counsel for respondent.

E. BARRETT PRETTYMAN,
General Counsel,

CHESTER A. GWINN,
Special Attorney, Bureau of Int. Revenue,
Washington, D. C.

Endorsed: Filed August 11, 1933. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-first day of September, 1933, there was filed in the Office of the Clerk of this Court, an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5029. October Term, 1932.

Sewell Lee Avery,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

The Clerk will enter our appearance as counsel for respondent.

PAT MALLOY,
Asst. Attorney General,
SEWALL KEY,
MORTON K. ROTHSCHILD,
Special Assts. to the Attorney General,
Washington, D. C.

Endorsed: Filed September 21, 1933. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-eighth.

And on the same day, to-wit: On the third day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 3, 1933.

Court opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029	Sewell Lee Avery vs. Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on October 19, 1933.

And afterwards, to-wit: On the nineteenth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 19, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029	Sewell Lee Avery vs. Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Leland K. Neeves, Counsel for Petitioner, and by Mr. John MacC. Hudson, Counsel for Respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-sixth day of October, 1933, there was filed in the Office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 5029 and 5030. October Term, 1933, October Session, 1933.

SEWELL LEE AVERY, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*
} Petitions for Review of Decisions of the United States Board of Tax Appeals.

October 26, 1933.

Before ALSCHULER, EVANS, and SPARKS, *Circuit Judges.*

EVANS, *Circuit Judge.* The two appeals here considered involve petitioner's 1924 and 1929 income taxes. The identical question is raised in each appeal. In what year is a dividend received for income tax purposes, the year the dividend is declared and payable or the year the stockholder receives the check therefor, if there be a difference in such years?

Petitioner was a large stockholder and president of the United States Gypsum Company, which, on November 12, 1924, declared a dividend on stock outstanding at the close of business on December 5, 1924, payable on or before December 31, 1924. A check for petitioner's dividend, dated December 31, 1924, amounting to $266,490.10, was by him received on January 2, 1925. A similar situation arose in 1929. The dividend was declared and made payable on or before December 31, 1929. The check which represented petitioner's

dividend was by him received on January 2 of the following year.

Petitioner raises no question as to liability for a tax upon such income. He complains of the ruling of the Board of Tax Appeals because that body approved the action of the Commissioner and held that these dividends constituted part of his income for the years 1924 and 1929. He insists that it was taxable to him as income in the years he received the dividend checks, which were 1925 and 1930.

Treasury Regulations 65, relating to the Revenue Act of 1924, provides:

> "ART. 52. *Examples of constructive receipt.*— * * * Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder. * * *
>
> "ART. 1541. *Dividends.*— * * * A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands."

Articles 333 and 621 of Treasury Regulations 74, relating to the Revenue Act of 1928, contain provisions substantially like those above quoted.

Petitioner contends that the regulations are not valid because in conflict with the statute, and *Commissioner* v. *Adams*, 54 F. (2d) 228, is cited in support of his contention. Commissioner, on the other hand, cites *Shearman* v. *Commissioner*, 66 F. (2d) 256; *Commissioner* v. *Bingham*, 35 F. (2d) 503; *Hadley* v. *Commissioner*, 36 F. (2d) 543; as well as rulings of the Board of Tax Appeals, Mary Miller Braxton, 22 B. T. A. 128; Franklin J. Matchette, 26 B. T. A. 909.

Both sides have advanced rather persuasive arguments in support of their respective contentions. They have been duly considered by the courts which have passed upon the same question, and there is little or nothing to be gained by a restatement of them. The principles governing judicial interpretation of statutes, the effect of departmental regulations followed by legislation, the effect of the elimination of a section in the Revenue Act following the promulgation of a regulation, as well as the weight to be given to the decisions of other courts—have all been duly and carefully considered with a result which will be announced without elaborating our reasons.

We conclude that the weight of the argument is in favor of

the conclusion that a stockholder of a corporation which has declared a dividend payable before a certain date, is on said date entitled to the sum thus declared as a dividend. His right thereto is traceable to the corporate action declaring the dividend, not to the check. The latter merely evidences the liability. It does not create the liability. The date the liability attaches, rather than the date of the check which evidences the liability, governs.

The orders of the Board of Tax Appeals are

AFFIRMED.

Endorsed: Filed October 26, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 26, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029 Sewell Lee Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the decision of the United States Board of Tax Appeals, entered in this cause on February 2, 1933, be, and the same is hereby affirmed.

And afterwards, to-wit: On the fifteenth day of November, 1933, there was filed in the office of the Clerk of this Court a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the twenty-first day of November, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, November 21, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5029	Sewell Lee Avery *vs.* Commissioner of Internal Revenue	Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the Court that the petition for rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 75 to 90, inclusive, contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, and a stipulation and order relating to the filing of briefs, and the Petition for a Rehearing) in the case of

Sewell Lee Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent,

No. 5029, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, A. D. 1933.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the fourth day of October, 1932, of the October Term, in the year of our Lord Nine Hundred and Thirty-Two, and of our Independence the One Hundred and Fifty-Seventh.

5030 Sewell Lee Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals

---

And afterwards, to-wit: On the eighteenth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of Counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030. October Term, 1932.

Sewell L. Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

The Clerk will enter my appearance as counsel for Petitioner.

LELAND K. NEEVES,
134 So. La Salle St.
Chicago, Illinois.

Endorsed: Filed July 18, 1933. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030. October Term, 1932.

Sewell Lee Avery, *Petitioner,*

vs.

Commissioner of Internal Revenue, *Respondent.*

The clerk will enter my appearance as counsel for Respondent.

PAT MALLOY,
SEWALL KEY,
Washington, D. C.

Endorsed: Filed July 24, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of July, 1933, there was filed in the Office of the Clerk of this Court an Affidavit of Service, Notice, Motion for Consolidation and for a Consolidated Transcript, and Affidavit in Support of Motion, which said Affidavit, Notice, Motion and Affidavit are not copied here as they are the same papers set out in full in the transcript of proceedings in this Court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith.

And on the same day, to-wit: On the twenty-fourth day of July, 1932, an order was entered consolidating this cause with cause Number 5029, which said order is not copied here as it is the same order set out in full in the transcript of proceedings in this court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith.

And afterwards, to-wit: On the twenty-fifth day of July, 1933, there was filed in the office of the Clerk of this Court a Motion for Substitution, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030.

Sewell L. Avery,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

MOTION FOR SUBSTITUTION.

Comes now the above named petitioner and moves the court that Guy T. Helvering, Commissioner of Internal Revenue, be substituted for David Burnet as respondent herein, and in support of said motion respectfully shows:

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review in this proceeding was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeeding and obtaining an adjudication of the questions involved, for otherwise the order of the Unitd States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of Section

11 of the Act of February 13, 1925, c. 229, 43 Stat. 941 (U. S. C., Title 28, Sec. 780).

Dated June 7, 1933.

LELAND K. NEEVES,
Attorney for Petitioner.

The undersigned, attorney for Guy T. Helvering, Commissioner of Internal Revenue, hereby expressly consents to the substitution sought by the above motion.

SEWALL KEY,
Special Assistant to the Attorney General, Attorney for Guy T. Helvering, Commissioner of Internal Revenue.

And on the same day, to-wit: On the twenty-fifth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, July 25, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

Sewell L. Avery 5030 *vs.* Commissioner of Internal Revenue	}	Petition for Review of Order of the United States Board of Tax Appeals.

Upon motion of the petitioner, expressly contended to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby ordered that said Guy T. Helvering, as such officer, be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

And afterwards, to-wit: On the twenty-first day of September, 1933, there was filed in the Office of the Clerk of this Court, an Appearance of counsel for Respondent, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5030. October Term, 1932.

Sewell L. Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

The Clerk will enter our appearance as counsel for respondent.

PAT MALLOY,
Asst. Attorney General.

SEWALL, KEY,
MORTON K ROTHSCHILD,
Special Assts. to the Attorney General,
Washington, D. C.

Endorsed: Filed September 21, 1933. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-eighth.

And on the same day, to-wit: On the third day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 3, 1933.

Court opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

	Sewell L. Avery	Petition for Review of Order of the United States Board of Tax Appeals.
5030	*vs.*	
	Commissioner of Internal Revenue	

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on October 19, 1933.

And afterwards, to-wit: On the nineteenth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 19, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

	Sewell L. Avery	Petition for Review of Order of the United States Board of Tax Appeals.
5030	*vs.*	
	Commissioner of Internal Revenue	

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Leland K. Neeves, Counsel for Petitioner, and by Mr. John MacC. Hudson, Counsel for Respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-sixth day of October, 1933, there was filed in the Office of the Clerk of this Court, the Opinion of the Court, which said Opinion is not copied here as it is the same opinion set out in full in the transcript of proceedings in this Court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith.

And on the same day, to-wit: On the twenty-sixth day of October, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, October 26, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

	Sewell L. Avery	Petition for Review of Order of the United States Board of Tax Appeals.
5030	*vs.*	
	Commissioner of Internal Revenue	

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the decision of the United States Board of Tax Appeals entered in this cause on February 2, 1933, be, and the same is hereby affirmed.

And afterwards, to-wit: On the fifteenth day of November, 1933, there was filed in the office of the Clerk of this Court a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the twenty-first day of November, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, November 21, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5030 Sewell L. Avery *vs.* Commissioner of Internal Revenue } Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the Court that the petition for rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages numbered from 93 to 100, inclusive, contain a true copy of the proceedings had and papers filed (excepting Affidavit of Service, Notice, Motion for Consolidation, and Affidavit in Support, filed July 24, 1933, order Consolidating causes entered July 24, 1933, and Opinion of the Court filed October 26, 1933, which are set out in full in the Transcript of Proceedings in this Court in cause No. 5029, Sewell Lee Avery *vs.* Commissioner of Internal Revenue, certified herewith; and Briefs of counsel, and Stipulation and order pertaining to the filing of briefs, and the Petition for a Rehearing) in the case of

Sewell L. Avery,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

No. 5030, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 19th day of December, A. D. 1933.

FREDERICK G. CAMPBELL,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

[fol. 102] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1933.

No. 791

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 103] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1933

No. 792

ORDER ALLOWING CERTIORARI—Filed March 19, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.